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The American State Series

# AMERICAN LEGISLATURES AND LEGISLATIVE METHODS

BY

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"COLONIAL ADMINISTRATION"



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## PREFACE

THIS volume seeks to furnish a description of the manner in which law-making bodies—State and Federal—in the United States are organized and operated. There is perhaps in this study more that is critical of the manner in which these legislative organs work, as compared with the description of their organization, than, strictly speaking, is warranted by the general scope of the series in which this volume finds a place. It is believed, however, that present political conditions justify this shifting of emphasis. In the first place, in the study of legislative organs, much more than in the case of judicial and executive bodies, is it necessary in order to secure an adequate understanding, to pass beyond a mere examination of their morphology, and to consider the exact manner in which their functional activities are carried on. In the second place, the legislative bodies of the American State, and, indeed, legislative bodies generally, are, at the present time, being subjected to a special popular as well as scientific criticism. Parliamentary institutions everywhere have indeed during the last quarter of the nineteenth century suffered a notable

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decrease of prestige. Even among those who have given much thought to the matter, there are many who believe that more than a merely temporary decline of efficiency has befallen the organ which until quite recently had been regarded as the chief source of strength of the Western political system. Yet no one who realizes by what gradual accretions the values of civilized life are enhanced and in how sure-footed a manner civilization advances, will be inclined to share the view of alarmists who predict the utter downfall of "government by discussion." Though we may not accept the Liberal dogma of government by the best reason, we must at least admit that parliamentary institutions have become part and parcel of our political life and that they cannot be discarded at will. High hopes have indeed been disappointed, but may not these have been given their original pitch by political inexperience and by a too facile optimism? Regrettable inefficiency has indeed been revealed, but perhaps the true function of the parliamentary body has not yet been determined and worked out in practice. It would indeed seem that too much has been expected of this institution. Too many functions have been conferred upon and claimed by it. The public has been rudely shaken out of its confidence in the "best possible form of government," and has learned by bitter experience that even this form may be put

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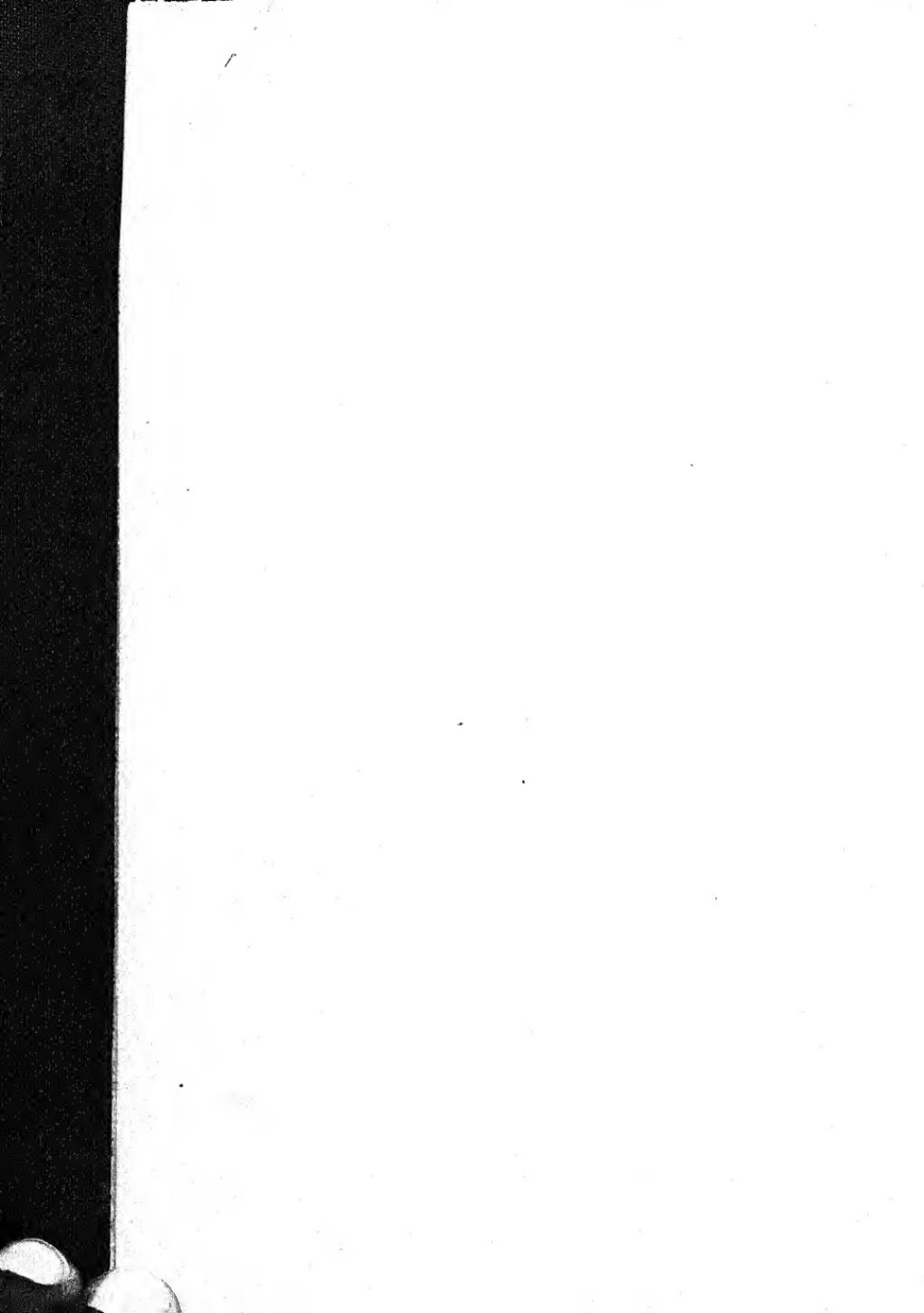
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to the worst of uses, but it will hardly do utterly to condemn the instrument because mistaken or even corrupt use of it has been made in the past. A little more wakefulness, a little more attention to the detailed workings of government, a more careful scrutinizing of the personalities to be endowed with public power, may yield returns and restore to usefulness and public confidence the institutions now so generally decried. In this work of reconstruction, the present brief study cannot hope to do more than call attention to the deep significance of the discrepancy between political ideals and political practice in legislative action.

Throughout the preparation of this work, the author has received most devoted and valuable aid from Mr. Horatio B. Hawkins, now of the Chinese Imperial Customs Service, in the collection of material and the work of verification. Being called abroad on a public mission before the book was completed, the author has intrusted the preparation of Chapter I, which deals with the constitutional framework of congressional government, to Professor Bernard C. Steiner of the Johns Hopkins University.

P. S. R.

UNIVERSITY OF WISCONSIN,  
July 1, 1906.



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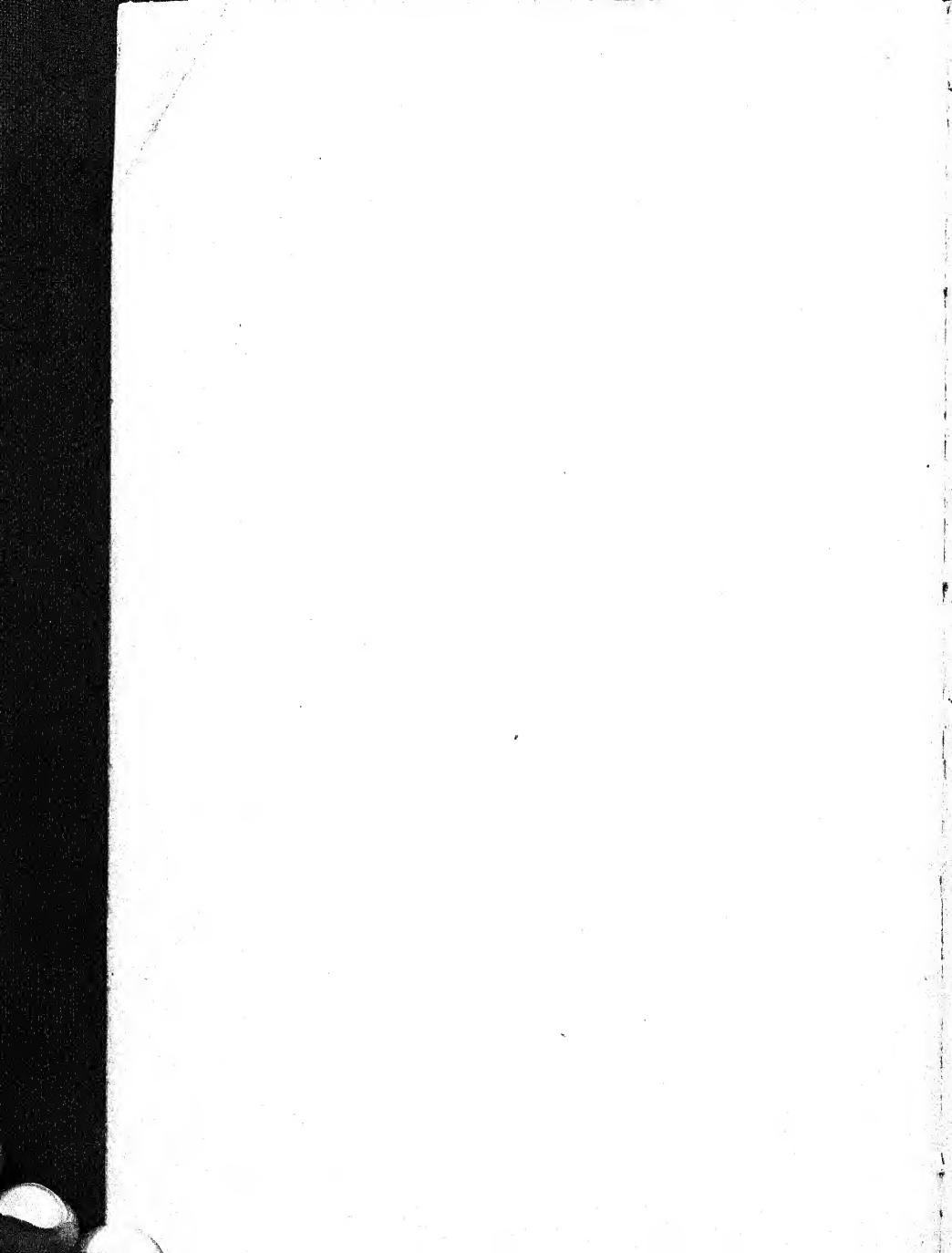
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**AMERICAN LEGISLATURES AND  
LEGISLATIVE METHODS**



# AMERICAN LEGISLATURES AND LEGISLATIVE METHODS

## CHAPTER I

### THE CONGRESS OF THE UNITED STATES<sup>1</sup>

THE framers of the United States Constitution placed in that document, immediately after the preamble, an article which provides for the organization and power of the legislative department of the Federal Government. This preëminence was rightly given the Legislature, inasmuch as it is the most important of the three departments into which the members of the Constitutional Convention of 1787, following the analysis of Montesquieu, divided the new government.

The United States Constitution is a grant of powers and not, like the state constitutions, a definition and limitation of powers previously existing; so that we must look for the powers which may be exercised by the Federal Legislature, either in some express grant made by the states to the Federal Government in the Constitution, or in some implied power found by necessary and proper deduction from such grant. All

<sup>1</sup> Prepared by Professor Bernard C. Steiner.

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these granted legislative powers, express or implied, are vested by the Constitution in the Congress of the United States.

Neither the phrase nor the institution was new to the members of the Philadelphia Convention. The word "congress" had been used since the 17th century to denote a formal meeting of deputies or plenipotentiaries of several princes to treat about the conditions of peace or to adjust some other important political interests. The Congress which framed the Peace of Westphalia in 1648, laid the foundations of modern diplomacy and was the forerunner of many important gatherings of ambassadors. In colonial America the word had been used for such conferences of the colonies for a number of years and, in 1765, the Massachusetts General Court thought it "highly expedient that there should be a meeting to consider of a general Congress." At first, the word seems to have been limited in meaning to its original connotation and Samuel Adams in 1773 spoke of a Congress and then an Assembly of States, as if the latter term alone should be used of a true law making body; but when the Second Continental Congress found it necessary to become an organ of administration and law making, it continued to use the old name. At the present day, it is customary to speak of Congress, without prefixing an article, but the Constitution always speaks of *the* Congress. The institution itself owed its first origin to those conferences which were early held between the settlers of Plymouth and Massachusetts Bay, or of Maryland and Virginia. The "meetings" of the Commissioners of the United

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Colonies of New England, to which gatherings Massachusetts, Plymouth, Connecticut, and New Haven sent representatives from 1643 to 1685, had given examples of a federal body; while projects for a Congress, like William Penn's plan of union in 1697, and the occasional conferences with the Iroquois at Albany kept the thought of such institution alive, until it took definite shape in Franklin's plan of union presented at the Albany Congress of 1754, which plan, while rejected then, had a potent influence in forming the Dominion of Canada over a century later.

To protest against the acts of the British government, a Stamp Act Congress had met at New York in 1765 and a Continental Congress at Philadelphia in 1774. Its successor in 1775 undertook the conduct of the war, declared independence and drafted articles of confederation to form a "perpetual union" of the states. This union was to be made "more perfect" by the Constitution of 1787.

The defects of the old Congress, with its one chamber, caused the members of the Convention to make the new Congress bicameral and to provide that "it shall consist of a Senate and House of Representatives." This having been determined, the next question was the basis of representation in the two houses. After a long struggle, in which the representatives of the smaller states contended for an equal representation of each state in either house, as had been the rule in the one house of the Confederation Congress, and those of the larger states insisted that representation should be proportioned to the importance of the states, the so-called Connecticut compromise was in-

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troduced, whereby, in the Senate, each state has two representatives and, in the House of Representatives, the number of representatives is based upon population. There were some who had wished to base representation on property and the question of counting the slaves was a difficult one, but these matters were finally settled by deciding that three fifths of the slaves should be counted in apportioning a state's representation in the House of Representatives, and that the federal census, which is taken decennially since 1790 to ascertain the population of each state for the apportionment of representation, should also be taken as a basis for any direct taxes which might be levied by the national government. From the rule in regard to slaves, until the abolition of the institution of slavery, there was a "congressional population," consisting of the freemen and three fifths of the slaves, in distinction from the actual population.

*Now there  
are 46 states  
and 96 seats  
in the  
Senate*  
At present there are forty-six states, so that there are ninety-two senators, when all seats are filled.

The first apportionment of members of the House of Representatives was made by the Constitution itself, in accordance with a rough guess made as to the relative populations of the states. When the decennial enumeration of persons is made, Congress reapportions the membership in the House, establishing whatever ratio it will between the number of persons and each representative, provided there are not less than 30,000 inhabitants to each member of the House. In practice, the number of persons to each member has been increased at each reapportionment, so that the increase of membership should not make the House

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too unwieldy, and the law now fixes 1 to 212,407 as the ratio. In spite of this increase in the ratio, the size of the House of Representatives has also increased, until there are now 433 members. New York State sends thirty-seven of these and Pennsylvania thirty-two, while Delaware, Idaho, Montana, Nevada, Utah, and Wyoming have but one member each. The rule followed "is to determine the amount of population which shall be entitled to one representative in Congress, and having allowed a representative to each of these numbers, to allow to every state an additional member for each fraction of its numbers exceeding one half of the ratio, rejecting from consideration the smaller fractions."

The task of dividing the states into congressional districts is left to the state legislatures. This division by the state legislatures is often made with a view to promote party advantage and without regard to natural geographical lines, which practice is known as gerrymandering.<sup>1</sup> If the number of representatives has been increased by a congressional reapportionment and the state legislature has not redivided the state before the election, the additional members are elected on a general ticket, every voter in the state casting a ballot for them. On a general ticket also are chosen all the congressmen, as members of the House of Representatives are commonly styled, when the state legislature has never divided the state, as is the case with South Dakota; or when the decennial apportionment shows a smaller number of congress-

<sup>1</sup> By act of Congress it is required, however, that these districts shall be composed of contiguous territory.

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men from the state than heretofore and the state legislature has not redivided the state before the election. The representation of fractions was not allowed until the reapportionment act following the Census of 1840, and was then introduced so as to "allot to every state in the Union its proper and just proportion of representative power." It is held, in the words of Webster, "that the representation of fractions less than a moiety, is unconstitutional; because should a member be allowed to a state for such a fraction, it would be certain that her representation would not be so near her exact right as it was before. But the allowance of a member for a major fraction is a direct approximation towards justice and equality." Every state, however, has at least one member, so Nevada is represented though its population in 1910 was less than one half of the number fixed as the basis of representation.

The House of Representatives is chosen "every second year by the people of the several states," this limitation in the Constitution preventing any Congress from extending its term as the English Parliament did in the 17th and in the 18th century. The term of each congressman begins at noon of the 4th of March succeeding his election, because the first Congress was summoned to meet upon that day. Each new House of Representatives is said to meet with the Senate as a new Congress. Thus a new Congress assembles every second year, and as the first one began its session in 1789, the Congress elected in 1914 is the 64th. In the Constitutional Convention the two-years term was adopted as a compromise be-

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tween adherents of annual elections, as was the rule for most of the state legislatures, and of triennial elections, as had formerly been the rule in Parliament; and the "Federalist" had to combat earnestly the idea "that where annual elections end, tyranny begins." Except in Connecticut and Rhode Island, members of the old Congress were chosen by legislatures of colonies or states, but the framers of the Constitution determined on an election of representatives by popular vote, which fact has caused the House of Representatives to be called the popular branch of Congress. It is also sometimes called the Lower House, because of the greater dignity of the Senate or Upper House, or in analogy to the use of these terms in England.

The electors of congressmen in each state according to the Federal Constitution "shall have the qualifications requisite for electors of the most numerous branch of the state legislature." What these qualifications now are, we shall consider in another place; but, for the present, it is sufficient to note that the electoral franchise for congressmen varies according to state law. The wording of the clause in the Constitution is to be explained as determined by the law then prevailing in Maryland, in which state the Senate, the less numerous house of the legislature, was selected by a body of electors chosen by popular vote. At the time of the adoption of the Constitution, property qualifications for voters were general and these or other ones may still be maintained by states, if they so decide; but, since the Constitution guarantees a republican form of government to each state,

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there can be no suffrage law inconsistent therewith, nor one which can be classed as a bill of attainder or *ex post facto* law. The fourteenth amendment to the Constitution, passed shortly after the close of the Civil War, gave Congress power to reduce the representation of any state in the House of Representatives, "when the right to vote at any election for the choice of electors for President and vice president of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime." The reduction is to be according to the proportion which the number of male citizens denied suffrage shall bear to the whole number of male citizens twenty-one years of age in such state. The provision was intended to prevent the disfranchisement of negroes in the Southern states, but Congress has passed no law attempting to enforce it. A further limitation upon the power of the states over suffrage is found in the fifteenth amendment, which provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude." It will be noted that this provision is worded in negative terms and does not refer to any class of persons, such as women, who have not previously enjoyed the elective franchise, nor to discriminations by a state not based on "race, color, or previous condition of servitude,"

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such as an educational or property qualification. The constitutionality of the so-called "grandfather clause" in some Southern states, admitting to the suffrage men because they or their ancestors possessed the right to vote prior to the time when occurred the admission of negroes to the suffrage, has not been passed upon by the Supreme Court of the United States. While at present suffrage at all elections has been granted to women only in a minority of the states, the movement is making rapid progress, and already the feminine voters are exercising an appreciable influence in the jurisdictions where they have been granted political rights. It is worthy of note that a person may have the right to vote for a congressman in one state and may lose it on removal to another state.

The "times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof, but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators." However inexpedient it might be to place congressional elections under federal control, there is no doubt as to the constitutionality of a law providing that the direction of such elections be taken from the hands of the state officials with whom it is at present lodged. In fact, however, though there has been federal supervision of congressional elections, the only provision of any importance made by Congress and now in force, is that all congressmen, except where a state statute enacted prior to the national law fixes a different date, shall be elected on the Tuesday after the first Monday in November. Tues-

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day, being near mid-week, is a convenient day for most men to go to the polls, and it is advisable to avoid placing elections on the first day of the month, which is usually a time of especially urgent business engagements. Oregon still elects congressmen in June, Vermont and Maine in September, in virtue of old unrepealed laws.

As to the election of senators, the federal statutes were much more minute and exacting. The Constitution states that the "Senate of the United States shall be composed of two Senators from each State chosen by the Legislature thereof, for six years, and each Senator shall have one vote." The further provision, forbidding Congress from legislating as to the place where senators should be elected, was inserted to prevent the legislature from being summoned to some inconvenient place. It has been settled by uniform acquiescence, that the governor of a state is not a part of the legislature thereof when a senator is to be chosen. The election could be made either in joint convention, in which a majority of the whole legislature took part, or by joint action of both houses of the legislature acting separately. In 1866, Congress passed an act which was long in force and which governed senatorial elections. Under this act "the legislature of each State, which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress, shall on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator." On that Tuesday, the houses of the legislature voted separately and *viva voce* for a senator, each member

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naming his choice. The result of the vote was entered on the journals of the respective houses and, at noon on the succeeding day, the legislature convened in joint assembly and listened to the reading of these journals. If it appeared that any one person had received a majority of the votes in each house he became senator. But if this was not the case, or if either house had failed to take proceedings as required, the joint assembly, by *viva voce* majority vote, elected a senator.

The method of election was changed by the 17th Amendment to the Constitution, adopted in 1913. It is there provided that senators are to be elected by popular suffrage in the same manner as Congressmen. Even before the adoption of this amendment, a number of states had made arrangements for the nomination of Senators by direct primaries; and although the legislatures were not constitutionally bound to carry out the behests of the electors in this matter, yet ordinarily political exigencies would have made such a course inevitable. In Oregon, candidates for legislative positions were by law required to indicate whether or not they would support the popularly nominated candidate for the Senate. Of the new method of election it is expected that it will tend to improve the personnel of the Senate and also to save the legislatures from corruption and from the waste of time through senatorial deadlocks, so frequent in the past.

Having considered the elections to Congress, let us now review the qualifications of its members. Each representative must "have attained the age of twenty-five years and been seven years a citizen of the United

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States" and must, "when elected, be an inhabitant of that State in which he shall be chosen." Senators are required to be maturer men. They must be thirty years old, have been citizens for nine years, and be inhabitants of the states they represent. It is noticeable that members of neither house are required to have citizenship in the state which they represent, although their residence is required to be there. In practice, an added requirement as to residence for each congressman is that he shall be an inhabitant of the district from which he is chosen; though in cities, such as New York and Baltimore, residents of one part of the city have occasionally been chosen from a district other than that in which they live. Members of Congress are not considered to be officers of the United States, and such an officer is distinctly forbidden from being a "member of either house during his continuance in office," lest his devotion to duty be divided. In this we differ widely from England, all of whose cabinet members *must* be also members of Parliament, in which body, moreover, officers in the army and navy often sit.

The fourteenth amendment excludes from Congress any person "who having previously taken oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as the executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection, or rebellion against the same, or given aid or comfort to the enemies thereof." This clause was inserted to meet the conditions existing at the close of the Civil War; but Congress has

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taken advantage of the power given it to remove such disability by a vote of two thirds of each house to such an extent that it is believed that there is no person now living who suffers from such disability. While these disabilities were in force, it was held that the election to Congress of a person suffering from them was voidable but not void, and that a subsequent removal of the disability entitled him to his seat. A person not properly qualified may sit in Congress, if no one calls attention to the lack of qualification. Thus Henry Clay took his seat in the Senate before he was thirty years old. The states have no power to add to the qualifications which are required for membership in either house of Congress and all laws which attempt to do so are mere self-denying ordinances. Thus when, in Maryland, the state statute provided that one of the senators should come from either shore of the Chesapeake Bay, it was a mere expression of the intention of the legislature and, in fact, a second senator was chosen from the western shore a month before the law was repealed. Story well says, that, if a state legislature has power to add to the qualifications, "a state may, with the sole object of dissolving the Union, create qualifications so high and so singular that it shall become impracticable to elect any representative. It would seem but fair reasoning, upon the fairest principles of interpretation, that, when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites."

Each house is the sole judge of the elections, returns, and qualifications of its own members; and

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also has the power to punish a member for disorderly behavior by reprimand, suspension, or otherwise, and with the concurrence of two thirds, to expel him. The distinction between the right to refuse admission and the right of expulsion is important, since the former can be exercised by the majority of a quorum, whereas expulsion requires the affirmative vote of two thirds of a quorum. The final qualification of the elected member to hold his seat is the taking an oath or affirmation to support the United States Constitution before the body to which he has been elected, after which proceeding he is vested with the full powers of membership.

When a vacancy occurs in the House of Representatives, the governor of the state in whose delegation the vacancy exists, is directed to issue writs of election to fill the residue of the term. Such vacancy may arise by death, expulsion, resignation, removal from the state, or setting aside of a previous election by the House of Representatives. The date of the election is in the discretion of the governor, who may call a special election, or permit the vacancy to be filled at the next regular election. A member of either house of Congress may resign his seat at any time, by a letter addressed to the governor of the state which he represents, and it has been held that neither the governor, nor the house from which he withdraws, has the right to refuse to accept his resignation. At the time the resignation is sent to the governor, it is customary for the member to address a letter to the presiding officer of the house to which

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he belongs, apprising the house, through this presiding officer, of the fact of his retirement. The resignation may be made to take effect at once, or upon some date in the future, although the former is much more common. Vacancies in the Senate, occurring during the recess of the legislature of any state, were formerly filled by the temporary appointment of the governor, whose appointee held office until the next meeting of the State legislature, when the duty to fill such vacancies devolved upon the latter. It was held in the case of Senator Quay of Pennsylvania, that the governor had no power to appoint, when the legislature had met and adjourned without filling the senatorship. The 17th Amendment provides that "where vacancies happen in the representation of any State in the Senate the executive authority of such state shall issue writs of election to fill such vacancies, provided that the Legislature of any State may empower the executives thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct."

When the first Senate assembled in 1789, it divided its members by lot, in accordance with the constitutional provision, "as equally as may be into three classes." The senators in the first class served for two years, those of the second class for four years, and those of the third class for six years, so that one third might be chosen every second year, and the Senate became a continuous body, with more than a majority of members holding over at any one time. Care was taken not to place any two senators from the same state in the same class and, when a new

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state is admitted to the Union, its senators are placed by lot in these classes, only one being added to any one class, in such manner as to keep the classes as nearly equal in number as possible.

At least one session of Congress must be held each year and the beginning of this regular session is on the first Monday in December, unless Congress by law appoints a different day. During the difficulties between President Johnson and Congress, the beginning of the first session of each Congress was fixed on the fourth of March; but the law was soon repealed and, except for this brief period, the December date has always been observed. It has one obvious disadvantage,—that the election of members has taken place thirteen months previously and that they do not come to the work of legislation fresh from the voters. The first regular session may continue for an indefinite time, even to the beginning of the second regular session; but, in practice, this first, or long, session usually ends in the early summer and it has never lasted later than October 20. The second regular or short session ends on the fourth of March, as the terms of the members of the House are then ended. Extra or special sessions of Congress, or of either house, may be called by the President, whenever in his opinion an emergency justifies it. Special sessions of the Senate have often been called to act upon appointments to office and upon treaties, but no special session of the House of Representatives separately has ever been called and it is difficult to see for what purpose it could be convened. The members of Congress are to be considered as representatives of

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their constituents and not merely as delegates. It is their duty to legislate for the benefit of the whole country rather than for the narrower interests of the district or state whence they are chosen. Though they will of course consider carefully the wishes of those who sent them to Congress, they are not legally bound to carry out detailed instructions from them, nor are they obliged to resign even if their constituents, displeased at their action, should demand it.<sup>1</sup> This unlimited power of representation was doubted in the early years of the Republic, especially in the Southern states and with respect to the members of the Senate, but it is now universally admitted as to both houses.

The House of Representatives chooses all its officers. Its presiding officer is known as the speaker,—a name derived from the similar officer of the English House of Commons, who is so known because he is the mouth-piece of the House in its intercourse with the King. The speaker is always a member of the House, the other officers are not now members, although the clerk was formerly often selected from among the congressmen. The clerk holds his office until the following House is convened, calls the new House together, and presides until a speaker is elected. Although this election is usually quickly made, the 34th and 36th Congresses arrived at a choice only after bitter struggles lasting for a number of weeks. As the speaker is a member of the House, he has a right to vote upon

<sup>1</sup> The Constitution has, indeed, not provided any means by which such instructions or demands may be legally and authoritatively originated by the electorate.

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all questions, and is in fact required to do so whenever his vote will decide the pending question, or when the vote is by ballot. In consideration of his arduous labors and dignified position, he receives a salary of \$12,000 a year, while the other congressmen receive only \$7,500. The speaker must authenticate by his signature all communications made by the House to other branches of the government. He appoints all select committees and presides and preserves order during the sessions. One of the most famous speakers, Thomas B. Reed, thus summarized his duties: "It is the duty of the presiding officer to call the assembly to order at the time appointed for the meeting, to ascertain the presence of a quorum, and cause the journal or minutes of the preceding meeting to be read and passed upon by the assembly. To lay before the assembly its business, in the order indicated by the rules. To receive any propositions made by the members and put them to the assembly. To divide the assembly on questions submitted by him and to announce the result. To decide all questions of order subject to an appeal to the assembly. To preserve order and decorum in debate and at all other times. To enforce such of the rules of the assembly as are not placed in charge of other officers, or of which the enforcement is not reserved by the assembly. To answer all parliamentary inquiries and give information as to the parliamentary effect of proposed acts of assembly. To present to the assembly all messages from coördinate branches and all proper communications. To sign and authenticate all the acts of the assembly, all its resolves and votes. To

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name a member to take his place until adjournment of the meeting and in general to act as the organ of the assembly and as its representative, subject always to its will." Among the other officers of the House are the sergeant-at-arms, who must preserve order, the doorkeeper, the postmaster, and the chaplain. All these officers are chosen by majority vote of the House, hold their offices until their successors are elected and have qualified, and appoint their subordinates. The senators receive the same salary as members of the House and, like them, choose their officers; with the important exception that the vice-president of the United States is *ex officio* the president of the Senate, in which position, however, he has no vote, unless the members are equally divided on a question. The Senate chooses a president *pro tempore*, who presides in the absence of the vice-president, or when he exercises the office of President of the United States. It is customary for the vice-president, shortly after taking the oath of office, to absent himself from the Senate for a day, in order that a president *pro tempore* may be chosen. The tenure of this officer is at the pleasure of the Senate and, as he is always a member of the body, he has a vote on all questions. The other officers of the Senate are about the same as those of the House and bear the same names, except that there is a secretary instead of a clerk.

Each house determines the rules of its proceedings. The Senate rules continue in force until changed, but each House of Representatives is a new body and therefore makes a new set of rules, carrying on busi-

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ness under the common parliamentary law, until the rules are adopted. It is usual for each house, at first, to adopt the rules of the last one, in whole or in part, and to make relatively few changes in them, in framing its own rules.

The senators' and representatives' salaries are fixed by law and have remained at their present figure since 1911. Each Congress has absolute power over its own pay and, in every case of change, the law has been made retroactive, so as to take effect from the beginning of the Congress which made it. In addition to the salary, each member receives an allowance for stationery of \$125 each year, a mileage of twenty cents per mile every session, and the privilege of appointing a private secretary at a salary of \$1200 per annum. The members of the Confederation Congress were paid by the states, those of the British Parliament are not paid at all; but it was felt that the members of the national Congress should be paid by the Nation. The long distances traversed by the members from their homes to the capital, the lack of a leisure class, the feeling that poor men ought not to be excluded, and the reasonableness of the rule that the state should make all legislators a fair recompense for their services, caused a rejection of the British precedent. Members also have certain personal privileges which were granted by analogy of those of members of Parliament. Thus they are privileged from arrest, in all cases except treason, felony and breach of the peace, at the session of their respective houses and in going to and returning from the same. Clearly the country ought not to be deprived of the services of

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its representatives, unless they have been guilty of grave offences. Another important privilege is that senators and representatives shall not be questioned in any other place for any speech or debate in either house, and so shall not be responsible out of Congress for words spoken in that body, which responsibility might unduly limit freedom of debate.

There are also certain restrictions imposed upon a senator or representative. He may not, "during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created or the emoluments of which shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office." These disqualifications were intended to prevent corrupt bargains and understandings between the Executive and members of Congress and to keep the two branches of government distinct. There is no prohibition, however, on the appointment of a senator or representative to a naval or military office newly created or increased in salary, nor to the appointment of a member of Congress to such a civil office immediately upon the expiration of his term, nor to his appointment to a civil office created before his term began, provided he resign his seat to accept such office.

A majority of each house constitutes a quorum to transact business and a majority of this quorum is sufficient to carry all measures except bills which the President has vetoed and amendments proposed to the Constitution, for which two thirds of a quorum

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are needed. It will be seen that with a bare quorum present, favorable votes of one more than one fourth of the total members may carry an ordinary measure, but this minimum is usually exceeded. In most of the Congresses since the Fifty-first, the speaker has had power to "count a quorum" in certain cases, that is to say "at the suggestion of the speaker the names of members sufficient to make a quorum in the hall of the House, who do not vote, shall be noted by the clerk and recorded in the Journal and reported to the speaker, with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business." If a quorum is not present, the Constitution permits a smaller number to adjourn from day to day and authorizes them to compel the attendance of absent members, in such manner and under such penalties as each house may provide. The House of Representatives, by its rules, has fixed the smaller number at fifteen, the Senate has named no particular number. With this power, whenever a quorum is found wanting by call of the roll or count of the presiding officer, the sergeant-at-arms may be furnished with a list of those members whom a call of the House discloses as absent and be sent to request, or if necessary to compel, the presence of those absent members.

Each house must keep a journal of its proceedings, that is a record of what was done at the sessions, and this journal for each day is read and corrected, if need be, at the beginning of each succeeding day's session. The journal, or record of things done, should be distinguished from the stenographic report of the

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debates which, as published, is known as the "Congressional Record." In the early Congresses, the Senate's sessions were secret, so that we have no official record of its debates; at present, the Senate maintains secrecy in the "executive sessions" in which it discusses communications from the President concerning foreign affairs, treaties, and nominations to federal offices. The Constitution requires that the journal be published from time to time, "except such facts as may in the judgment of the houses require secrecy."

There are a number of ways in which measures are voted upon in Congress. The most usual manner is *viva voce*, in which the presiding officer decides the result in the affirmative or negative, according to the greater volume of the combined voices of those voting on either side. If he is in doubt, he asks the members to rise while he counts them; and if his decision is questioned and a "division" of the House called for, the count must be made and the result announced to the speaker by two tellers, between whom the members pass. A more formal method of voting is by yeas and nays, in which the clerk calls the roll and records after each man's name "yea," "nay," "absent," or "not voting." This method puts a man upon record and shows his constituents and the world at large how his vote was cast. The Constitution provides that "the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal."

In case a house wishes to postpone business for a short while, it may take a recess; if it has concluded all the business of the day it may adjourn until the

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following day, or indeed for more than one day; but the Constitution wisely prevents friction and deadlocks between the two houses, by providing that "neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses are sitting." By mutual agreement, the two houses may adjourn to any day certain, or, if they wish to end the session, adjourn indefinitely or *sine die*. As the President has the power of convening Congress in extraordinary session, so he also has the power, in case of disagreement between the houses with respect to the time of adjournment, to adjourn them to such time as he shall think proper. It has never, however, been found necessary to exercise this power.

While in session, practically all of the business of the houses is referred to committees and important measures are often discussed informally by the whole House, in what is known as Committee of the Whole. The committees are of two kinds: *standing*, that is, appointed under the standing rules of the House and dealing with some permanent branch of legislation; and *select*, that is, such as are appointed to consider some particular question. The committees may also be classified by cross division into joint committees, in which there are members from both houses, and committees composed entirely of members from one house. The committees are usually arranged so that the chairman and the majority of the members are chosen from the adherents of the political party which has a majority in the membership of the body. In

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a recent Congress (the Fifty-ninth), there were fifty-five standing and ten select committees of the Senate varying in membership from three to seventeen; while in the House of Representatives there were sixty-one standing committees, varying in membership from five to nineteen. As every bill is referred to a committee, it is easy to see how these bodies can control legislation, by failing to report measures referred to them or by casting the weight of their influence for or against certain bills by favorable or unfavorable reports.

Every measure introduced into Congress is put in the form of a bill or a resolution. A bill, when passed, becomes an act and is distinguished by the enacting clause which reads thus, "Be it enacted by the Congress of the United States." A resolution contains the word *resolved* in place of enacted. Resolutions are usually of a less permanent character than laws and express rather the opinion of the Legislature, but it is frequently difficult to distinguish them from laws in their subject matter. Resolutions are classified as: *joint*, that is, requiring the action of both houses; *concurrent*, where the same words are adopted by each house independently of the other; and *several*, that is, passed upon only by one house. The ordinary course of a bill or resolution which is passed through the house involves three readings on three different days, between which readings it is referred to and reported on by an appropriate committee, engrossed or written out in a fair hand by a copying clerk, and printed. Having passed one house it is sent to the other where it goes through the same procedure, ex-

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cept that a second engrossing and printing is not necessary. In either house, the bill may be amended, and, if the two houses agree as to the general principle of the bill, but differ as to details, a joint committee of conference, appointed especially to consider the bill, endeavors to come to an agreement which both houses may accept. When a bill has passed both houses, it is submitted to the President of the United States. If he approve it, he signs it and it then becomes a law. If he disapprove of it, he "shall return it, with his objections, to that house in which it shall have originated," which procedure is known as a veto. The President has ten days (Sundays excepted) to sign or veto a bill. If he does neither within this time, the bill becomes a law without his signature, so that his obstruction may not prevent legislation. He is entitled to the full ten days for consideration and, as it is held that he cannot sign a bill when Congress is not in session and, of course, cannot return it with objections, if the house is not sitting to consider the objections, all bills sent to the President within ten days of the end of the session and not signed by him before the end of the session fail to become laws for lack of signature. This is sometimes called the President's pocket veto. In order to prevent Congress from evading the veto power, by placing the subject matter of a law under some other form, the Constitution provides that "every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary" shall be presented to the President and that the subsequent procedure upon it shall be the same as that of a bill. Votes on a ques-

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tion of adjournment, on which the wishes of the houses should be unfettered, are the sole exception to this rule. If the President vetoes a bill, the house to which he returns it "shall enter the objections at large on their journal and proceed to reconsider the bill." If after such reconsideration, two thirds of that house shall agree to pass the bill it shall be sent together with the objections to the other house, by which it shall likewise be reconsidered and, if approved by two thirds of that house, it shall become a law. But in all such cases, the votes of both houses shall be determined by yeas and nays and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively."

Amendments to the United States Constitution may be proposed to the several states by an affirmative vote of two thirds of both houses of Congress. These amendments are not presented to the President for his signature, as they have already received a vote which would be sufficient to overrule a veto.

In addition to the several functions which they exercise in common, the two houses have certain special functions. Thus the Senate acts as a part of the treaty-making power, a vote of two thirds of a quorum being required to concur in any treaty made by the President of the United States, before it can go into effect. So, too, the Senate acts as a council to the President in regard to filling offices, for the Constitution provides that "he shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other

officers of the United States, whose appointments are not otherwise provided for" by the Constitution and which offices shall be established by law. As the country has grown, it has become impossible for the Senate to consider all appointments to office or even for the President to nominate all officers directly, and advantage has therefore been taken of the further provision of the Constitution that "Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments." As a result, the greater number of inferior officers receive no congressional confirmation. If a nomination to office is made by the President to the Senate and is rejected, there is nothing in the Constitution to prevent him from sending the same name in again; but, in practice, this is almost never done, unless requested by the Senate when it has rejected the nomination under a misapprehension. It may happen that the Senate fails to act upon a nomination by final adjournment and that the term of the incumbent expires before another session convenes. In that case, a vacancy in the office occurs which may be filled in the same manner as a vacancy arising in any other manner. The President has "power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." The Senate also has the special power of choosing the vice-president of the United States from persons receiving the two highest numbers of votes in the Electoral College, when no one candidate has a majority of the electoral votes for that office.

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The Senate has the sole power to try all impeachments, sitting for that purpose as a high court, with its members under oath or affirmation specially taken. The President, vice-president, and all civil officers of the United States may be brought before this court on charges of treason, bribery, or other high crimes and misdemeanors, which unlawful acts need not be statutory crimes. When the President of the United States is tried, the chief justice of the Supreme Court presides, but he has no vote in the final decision. No person may be convicted in this court without the concurrence of two thirds of the members present. Impeachment is a cumbrous remedy for evils and has been used only eight times. The most famous impeachment trial was that of President Andrew Johnson, the most recent one that of Judge Archbald, removed in 1913. Military and naval officers are not impeached but are tried by courts martial. The right to bring an impeachment resides in the House of Representatives, as a survival of the old power of the House of Commons to act as the Grand Inquest of the State. When it votes to impeach an officer, it also appoints managers of the trial, who act as prosecutors on behalf of the House.

Another special power of the House of Representatives also comes to it from the English House of Commons, namely, the exclusive right to introduce money bills, or those which provide revenue for the carrying on of the government. This power was in the English House, because it alone, as representative of the people, could grant their money to the crown. In the United States, there is no very important reason for

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vesting the power in the House of Representatives, and as the Senate may amend such bills to an unlimited extent, the power is not a very important one.

A third power belonging to the House of Representatives alone is that of choosing the President of the United States, when the majority of votes in the Electoral Colleges are not cast for any one man. In this case, the House votes by ballot and by states, each state casting one vote and voting for one of the three persons receiving the highest number of votes in the Electoral Colleges. For this purpose, a quorum consists of a member or members from two thirds of the states and a majority of the states is necessary to a choice. In 1801 and in 1825, this function fell to the House.

The common power belonging to the two houses of Congress in the matter of elections is to meet in joint convention after the voting of the Electoral Colleges for President of the United States, at which time the Constitution provides, the president of the Senate "shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

## CHAPTER II

### THE HOUSE OF REPRESENTATIVES

ON account of the federal nature of our constitutional system, Congress has next to nothing to do with the general civil law. The legislation affecting the ordinary relations between individuals, or the general rules of civil action, originates in the state legislatures, in as far as the development of the common law is not left entirely to the courts. While Congress, in the exercise of such powers as that to regulate interstate commerce, may originate rules by which people in general are bound in their business relations, such action does not constitute a large part of its work, and its legislation is ordinarily regulative of governmental agencies, or in other words, administrative. The most cursory examination of the legislative work in any session of Congress will reveal the extent to which its attention is taken up with matters of administrative policy. Consider, for example, the topics of legislation in a recent Congress—the Fifty-seventh; they fairly indicate the character which congressional action usually takes. The principal work of that Congress embraced the following subjects:—the creation of the Department of Commerce and Labor, the

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Elkins anti-rebate law, the provision for the permanent census bureau, the maintenance of Chinese exclusion, the beginnings of the Panama canal, the establishment of civil government in the Philippines with the extension of the gold standard thereto, the creation of the general staff, the establishment of a national militia system, irrigation grants for the arid lands of the West, the augmenting of immigration restrictions, the anti-oleomargarine act, the new bankruptcy law, the repeal of the Spanish war-taxes, the removal of the duty on anthracite, and the appropriation of over \$1,500,000,000. The chief business of Congress is the appropriation of money for the work of the various departments of government, the providing of ways and means to meet this expenditure, the creation of new administrative agencies, the maintenance of the national defense on land and sea, the control of the various wards of the nation—the Indians and the people of the territories and dependencies—the regulation of economic activities as far as they form part of inter-state commerce, and the administration of what remains to the United States government of natural wealth in forests and other public lands.

Congress is therefore constantly dealing with administrative policies, and it is inevitable that there should be a struggle for influence and power between the President and Congress, as well as between the two houses. New channels of public authority are being worn at the present time, the direction of which it seems beyond human contrivance to modify. Men are becoming conscious of the implied logic of our

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institutions, and are beginning to feel that the organic life of government and the struggle of political entities for predominance cannot be confined within the dry principles of the theory of the balance of powers. As yet it is by no means clear in which direction the center of gravity of our political system is bound to settle. It is indeed still believed by many that it will be possible to maintain the permanent equilibrium between the various departments of government; that considering the existence of really great powers and functions in each of the branches, it will largely depend upon the personal equation as to where at any given time the principal authority may be found. According to this view there is a pendulum swing of political influence, but no branch of the government can hope for a permanent conquest of the supreme power. The character of the presidency will depend upon whether a Jackson, a Tyler, a Johnson, or a Cleveland is the incumbent of that office; and the ability, moderation, and political mastery of the leaders of the two houses will have a great influence in determining the relative position of these bodies. This view of the continuous balance of political power, though containing much truth, nevertheless rests on a superficial foundation; for it is usually based on purely legal reasoning. The history of institutions shows that there is a deeper current than mere personal influence or legal arrangement which determines the rise and fall of the power of the various organs of government. It is rather through a study of the manner in which institutions identify themselves with social forces that a cue may be found for

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an understanding of the logic of institutional development. In proportion as an institution or magistracy succeeds in making itself the index and exponent of the most pervading economic and social forces within the national life, its influence rises or falls. It is also important to consider how the various interests within the nation are organized, as upon this depends the effectiveness of the support which they are able to give to an organ which primarily represents them. On account of the growing intricacy of social and economic interests, a more and more complex system of governmental agencies—including the representative bodies—is being developed. It will therefore readily be seen how absolutely inadequate for a satisfactory judgment of the real distribution of political powers among the various organs of government would be the merely logical analysis of their constitutional functions, without a consideration of the social and political background upon which the exercise of these functions rests. Nevertheless a careful analysis of this nature must constitute the first, though only the introductory, part of the study of the constant struggle for political power which is being waged between the great organs of state life. This analysis has led interpreters to varying conclusions. According to some, Congress through its power of general legislation and of specific interference with the administrative departments, is destined to become the virtual depositary of the sovereign authority; while in the view of others the magisterial authority of the President places him in a position where he will become more and more the central force in the government, and the original

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source of action will be found in the administrative departments.

We may be pardoned for reviewing the cardinal factors in the situation, although they are of course present in the mind of every student of the Constitution. Such a review will show clearly what is involved in the question as to whether a permanent equilibrium between the organs of government is possible, and what are the points of vantage from which each of them may defend its influence and importance.

The President's position is to some extent based on his veto power, which makes him a participant in legislative action, but the real source of his importance lies in the various elements which constitute his magisterial authority. The latter comprises far more than the routine of executing such laws as Congress may make. In international affairs the President's initiative may ordinarily determine the course of action taken by the national government, and although the President cannot declare war he has very frequently the opportunity of causing it. In domestic affairs his control of the scientific and technical branches of the administration, his power to enforce the laws, including the provisions of the Constitution, give him a discretionary authority the implications of which are just beginning to be realized. Recent political campaigns have also shown that the President may exercise a very strong influence within and through the party organization.

The Senate, in the eye of the public the chief competitor of the President for predominant authority,

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has also a formidable array of powers together with great advantages of organization. It is a permanent body, large enough to be representative of many interests, small enough to be permeated by an intense feeling of solidarity; through its power over treaties it exerts a strong influence over the conduct of foreign affairs; it shares in the appointment of high officials, including the justices of the Supreme Court; it exercises a detailed supervision of administrative departments; and its relations to the House give it ordinarily a controlling influence over appropriations and general legislation. It has a close organization, flexible, subtle and powerful for action. Its rules of "courtesy" give prominence and dignity to its individual members. It has in the recent past enjoyed great political power in the party organizations, enabling its members or groups of them to make Presidents and members of the House of Representatives. Its influence is increased by the great material power enjoyed by some among its members, and by the intimate connection of senators with such economic interests as insurance, railways, express companies, mining and industrial corporations.

Compared with such powerful organs as the Executive and the Senate, the House of Representatives at first sight appears in a position of considerable disadvantage. However, on account of direct and frequent elections by the people, it may claim importance as affording a just index of popular feeling which cannot safely be disregarded; moreover, the concentrated power of the speakership offers great opportunities to a leader of real ability for influencing the conduct of

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public affairs. After a more careful analysis of the political powers of the House and of the machinery there provided for producing legislative action, we shall be in a position to judge more intelligently of the true tendencies of political development and of the chances whether any one organ of government may be able to draw into its hands all the principal political powers.<sup>1</sup>

The history of the House has brought out very clearly the inherent weakness of government by discussion. Created at a time when men were afraid of executive discretion, our government is constituted in such a way as to give Congress a better opportunity for exercising power than any other parliament, with the exception of that of Great Britain, has ever possessed. The belief of the nation in government by discussion remained very strong throughout the greater part of the nineteenth century. Men were elected as representatives because they could talk—selected indeed almost entirely from a profession trained in public discourse; and discussion of political problems was for a long time the main intellectual

<sup>1</sup> As it would be impossible in this place to give a detailed account of the historic development of procedure in Congress, familiarity with the results presented by Mr. Bryce in his "American Commonwealth," by President Woodrow Wilson ("Congressional Government"), Miss Follett ("The Speaker"), and Dr. McConachie ("Congressional Committees"), is presupposed by the author, who will confine his attention principally to the tendencies which have revealed themselves more clearly since these books were written, and to an account of the present political situation in the House of Representatives and the Senate.

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interest of the nation. And yet in proportion as economic life became diversified and complicated, government by deliberation began to fail. The very machinery of government by discussion was constantly used by powerful private interests for the purpose of obtaining special franchises and other privileges, and of defeating any general legislation that might be unfavorable to them. The spirit of institutions thus suffered a radical change and the freedom of parliamentary discussion was gradually more and more circumscribed.

The development outlined above has taken place more or less in all the legislative bodies of the nation. In the two houses of Congress different aspects of this tendency revealed themselves. For in the Senate discussion frequently became trivial and meaningless on account of its very abundance, and the narrower interests there represented found the lack of parliamentary restrictions admirably adapted to their special purposes. Whereas, in the House, unwieldy and loosely organized as it was until very recent times, frequent and immoderate obstruction rendered almost impossible the continuance of the legislative business. The House therefore decided, or rather circumstances decided for the House, that power must be concentrated in the hands of a few leaders. The theory of democracy is favorable to a dispersion of power; concentrated authority is feared; power must be divided among a large number of officials or agencies; and great reliance is placed upon a system of checks and balances. It has, however, become clear that government is not a matter of mathematical

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computation, but a matter of life and action, and that a governmental organ whose efficiency has been impaired by the dispersion of authority will instinctively seek an agency through which after all it can *act*, and will endow that agency with almost absolute power. The minute division of authority in governmental organs may therefore be viewed as one aspect of that political disintegration which inevitably leads to some form of absolute dictatorship.

The history of the House exhibits two contradictory tendencies. Following the impulse of democracy, according to which every member should share as far as possible in power, the business of the House was gradually dispersed more and more among an increasing number of committees. But from the anarchy thus resulting no escape seemed possible, except through the creation of a highly centralized authority. Even in 1885, when a large part of the work of the Committee on Appropriations was distributed among a number of minor committees, Blaine and Randall, as speakers, had already made use of the power to appoint committees and to recognize members with the distinct purpose of controlling legislative action. Carlisle, too, was soon to follow a policy of even more distinct leadership in legislative matters.<sup>1</sup> Mr. Reed completed the work of his eminent predecessors, and gave the House an organization which invested the majority with power to act at any time, but which was also the climax of centralized authority and caused the

<sup>1</sup> E.g. In 1887, he refused to recognize any member desiring to bring up a bill for the repeal of certain internal revenue taxes.

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repression of the individual member into a very narrow sphere. Experience had shown that such a close hierarchy of leadership was necessary to prevent a state of affairs where irresponsible discussion would make responsible action impossible, since the right of discussion was constantly used by individual interests for purely dilatory purposes.

It is difficult to dissociate Mr. Reed's rulings from the influence of his powerful personality. He was one of those rare men whose constant command of the situation and whose analytical foresight enable them to turn the smallest incident to advantage in developing their power. His action was always constructive, never haphazard. He foresaw the potentialities of new rules and the exact scope of their action; and when he had established them, he constantly administered them in such a manner that they yielded a permanent increase to the power of the Speakership. His power, however, rested not so much upon the new rules which he established, as upon the harmony and consistency which he worked out between these and the older rules which he had inherited from his predecessors, thus creating a coherent system which at all points supported the supremacy of the speaker. Nor were the specific changes which he introduced, as is often alleged, entirely revolutionary, and the product of his own constructive imagination. For though bold in independent action, he also had the extreme caution of statesmanship, and in adopting innovations he confined himself to those which were clearly necessary to complete the organic evolution of an effective political leadership of the House.

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The practice of counting a quorum was indeed contrary to the more recent precedents in the House. But Mr. Reed argued that as the presence of a quorum had often been tacitly assumed when fewer than a quorum had voted, it would be permissible openly to ascertain the presence of a quorum when a less number had voted and thus to establish the validity of the action.<sup>1</sup> Mr. Reed's ruling in this matter was supported also by general parliamentary law, and by the practice of many state legislatures.<sup>2</sup> Lieutenant-Governor Hill, of New York, had put the matter in the following convincing language: "If a senator is in fact present, his refusal to vote, which is a violation of his duty, does not make him absent in a parliamentary sense." The House of Representatives itself had some earlier precedents favorable to Mr. Reed's position. The legal correctness of his ruling could of course not be doubted after his decision had been sustained by the House, and subsequently by the courts.<sup>3</sup> Nor can his act be called essentially

<sup>1</sup> See ruling in Hinds, "Parliamentary Precedents," sec. 242.

<sup>2</sup> E.g. Massachusetts, New York, and Tennessee. In Pennsylvania, constructive absence was reduced to an absurdity by a member of the minority, who happened to be in the chair, deciding that he himself was not present. Thomas B. Reed, "The Limitations of the Speakership," N. Am. Rev., 150:388.

<sup>3</sup> U. S. v. Ballin, 144 U. S., 1. "The Constitution has prescribed no method of making this determination, and it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers and their count as the sole test, or the count of the speaker, or the clerk, and an announcement from the desk of the names of those present."

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revolutionary, because it was part of a general organic movement towards the constitution of a highly efficient, centralized authority in the House.

Mr. Reed's ruling through which he excluded dilatory motions was based upon certain precedents in the House of Representatives itself, although he exercised the power more frequently and with greater rigor than any previous speaker. These rulings were avowedly designed to make majority action possible, and to prevent inordinate delay. But since the majority, as a matter of fact, could act only through the speaker and the other leaders of the hierarchy, the addition of these rules brought a great accession of authority to the speaker. Mr. Reed also used all the other powers developed by his predecessors with great effect, such as the appointment of committees, the control exercised through the Committee on Rules, and the power of recognition.<sup>1</sup> All these powers were used with the distinct aim of impressing the speaker's legislative policy upon the House, and of preventing action on measures which to him appeared unwise or unnecessary.

Thus it has come about that the majority itself is bound by the rules designed to make its action possible. The House acts through its leaders. Independently of them the individual members can accomplish next to nothing. Nor does the House exercise a direct influence over the deliberations of its committees. Thus in 1898, it was ruled that a motion directing a committee to report upon a certain matter was out of order.<sup>2</sup>

<sup>1</sup> E.g. He refused to recognize any one desiring to bring up a free silver bill.

<sup>2</sup>Hinds, "Parliamentary Precedents," sec. 698.

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The powers of the leaders have been greatly augmented through the development of the Committee on Rules. This body was at first comparatively unimportant, being a select committee appointed for the purpose of reporting on the rules at the beginning of each Congress. But in 1880, it became a standing committee, and then gradually extended its functions so as to embrace not only the making but also the suspension and the administration of rules. In 1891, it was granted the right to report at any time, and two years later was given the unique privilege of meeting even during the sessions of the House. In the latter year, too, the important ruling was made that the committee might report a special order even though not specially referred to it. The question whether a resolution<sup>1</sup> reported by the Committee on Rules is to be considered by the House will not be put by the speaker, on the ground that, as such resolution itself proposes the consideration of a bill, there would be an unnecessary doubling of motions, were the above questions allowed to be raised.<sup>2</sup> The reports of this committee are therefore peculiarly protected against dilatory tactics. The Committee on Rules may go so far as to propose for consideration a measure not yet reported by the committee to which it had been referred, so that in effect a committee may thus be discharged from a matter pending before it.<sup>3</sup>

The essence of the power of the Committee on Rules lies in the fact that it has the right to report at any time a resolution that a bill or other measure be made

<sup>1</sup>Relating to the order of business.

<sup>2</sup>See Hinds, "Parliamentary Precedents," secs. 831-2.

<sup>3</sup>Hinds, "Parliamentary Precedents," sec. 1542.

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a special order for a certain day. As nearly all the important measures before the House of Representatives are dealt with under special orders, the Committee on Rules has therefore in its hands practically the complete control of the course of business in the House. It determines what measures shall be discussed, how much time is to be given to them, and in what order they are to be brought up. The resolutions reported by the Committee on Rules are of course ineffective unless adopted by the House, but as the majority in the House can act only through its leaders, such resolutions are ordinarily adopted as a matter of course. This powerful committee, however, is only an appendage to the speakership, and its prominence is due to the fact that the speaker himself is a member of it. When, through the dispersive tendencies already noted, the business of Congress had become more and more broken up and divided among an increasing number of committees, concentration became necessary; and it is but natural that the committee of which the speaker was a member and whose functions were not confined to any particular class of business, but dealt with the general rules of the House, should draw to itself the power of controlling the temporary modification of such rules, and thereby of controlling the congressional business itself.

Considering the great power of the Committee on Rules and the fact that it is but a satellite to the speakership, it is believed by many that its development represents too great a centralization of authority. Suggestions have therefore repeatedly been

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made for a modification of its structure. It has been urged that the election of the committee by the House itself would insure greater individuality on the part of the members elected, so that they would be likely to represent more fairly the different groupings of opinions and interests in the House. Such an attempt to substitute an aristocracy for a dictatorship would at first sight seem to promise well for the dignity and efficiency of the House. It can scarcely be claimed that the members whom the speakers have associated with themselves on this committee from time to time, have always or even generally been men of broad and representative statesmanship; and if the committee could be transformed into some resemblance to the British Cabinet, a representative council of the ablest leaders of the House, the latter body would undoubtedly gain much in self-respect and real influence. It is however questionable whether such a result could be gained through the method of election. Under the present system the members of the committee are selected by the speaker in accordance with the general principle of leadership in the House, that is, less on account of striking ability and mastery of public questions than because of long-continued experience in the technique of House and committee procedure. The selection is indeed far from being governed by caprice or by a mere desire of obtaining willing instruments for the speaker's purpose, although of course he is not likely to select men violently opposed to him in political views. If the matter were to be decided through action by the House, the House would either have to follow the system now in vogue, which

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is largely one of seniority promotion; or it would have to exercise the very difficult function of selecting from among the younger men those who could, without having been thoroughly tried, be trusted with leadership in the intricate business of legislation. The mere statement of the alternative is sufficient to indicate how unsafe it would be to make confident predictions as to the result to be expected from a change in the method of selection. Another part of the committee for reform contemplates the increase of the committee so that it should contain at least five members of the majority. This would clearly make the committee more representative, and it would also enable the speaker to utilize the services of men of great ability who have not yet served long enough in the House to secure the patent of leadership under present conditions. The most serious objection to the suggestion lies in the fact that the functions of the committee are such as require quick and decisive action. The diffusion of business in the House calls for a heroic remedy, and the time does not yet seem ripe for the substitution of a larger and more representative body in the place of the two majority members who now act virtually as lieutenants of the speaker.

Let us now consider the most recent development of practice and procedure in the House of Representatives. When Mr. Reed returned to the speakership in 1895, the use which he had made of his power during his earlier term of office had practically been justified by his political opponents who had so violently criticized his conduct at that time. Themselves in

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power as the majority in the House, they had been forced to recognize that the transaction of business required an intense concentration of authority in the hands of the speaker and of the Committee on Rules. On account of the political prominence which their strenuous opposition had given to the rule of the Fifty-first Congress that no dilatory motion shall be entertained by the speaker, they did not consider it advisable to re-enact this rule during the two Democratic terms. But filibustering was so rampant, and the efficient action of the House of Representatives was so seriously impeded by obstructionists, that the leaders of the Democratic party tacitly recognized the justification of this rule and ceased their opposition to it when it was re-introduced by the Republicans in the Fifty-fourth Congress. The rule respecting the quorum was continued in the Fifty-second Congress in a modified form, maintaining its principle, but having the count made by tellers from both parties,—a merely formal change. Mr. Reed, therefore, returned to the speakership with a great accession of influence, and when two years later his party was completely successful at the polls in the presidential election, he reached the zenith of his career as a great party leader. The extent of his authority is apparent from his action during the short session of 1897.<sup>1</sup> The extra session had been called for the

<sup>1</sup> "The Nation" of March 8, 1897, expresses the growing consciousness of the speaker's power, in the following words: "The speaker's control over legislation is now, under the rules and practices of the House, almost absolute. . . . The

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purpose of revising the tariff. The Dingley bill, prepared in anticipation of the extra session, a highly important measure which affected every industrial pursuit in the country, was introduced and forced through the House within two weeks. Only the most superficial discussion was had and the measure was sent to the Senate, where, as is usually the case, it was subjected to careful scrutiny and a large amount of modification. Speaker Reed had not appointed the standing committees of the House at the beginning of the session, and during all the months when the Dingley bill was being dissected in the Senate he kept the House unorganized for business, and, holding the whip-hand over it, allowed no important action whatever to be taken. The delay in committee appointments secured for him the absolute mastery of the situation. He prevented the House from voting on the Cuban Belligerency resolution of the Senate as well as on the Nicaragua Canal bill, although it is very probable that these measures would have been passed by large majorities, as the clamor for their consideration was great and pertinacious. But the members of the House did not dare to brave the speaker at this time, for so long as the committees had not yet been appointed the power of punishment and reward was still in his hands. Had Reed merely been

people know this now. The time has passed when the speaker could exercise his vast power unsuspected. Nor can he shirk his responsibility. No bill can pass the House without his passive approval, and that in effect is the same thing as active advocacy. It is Speaker Reed more than any other man or set of men who will give us our new tariff."

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a leader of the House, a successful revolt might have been organized against him at this time, but he was also a leader of his party. His political character and the policies for which he stood had been vindicated and he seemed irresistible, second in power to none with the possible exception of the President. When it was attempted to test the feeling of the House by moving a resolution calling upon the speaker to appoint the committees, he was supported not only by the solid phalanx of his own party, but even by more than one-half of the members of the minority. It was only at the end of the session, on July 24, when the Dingley bill had become a law, and when the measures objectionable to the speaker had been abandoned, that the make-up of the committees was finally announced. It is true that in this matter Mr. Reed could appeal to the precedent established by Colfax and Blaine, in the sessions of 1867 and 1871. The situation at those times was, however, very different, and the delay in committee appointment did not imply such overshadowing power on the part of the speaker.

In the year after this great display of parliamentary authority, the House, as it does at times, broke away from the strict control of the speaker. Reed himself seemed to hold the reins somewhat laxer. He had no such definite policy to establish as in 1897; moreover, the demoralizing influence which war always exercises on political action, seems to have affected the House, making it less inclined to regular discipline. The House refused to follow the views of the speaker on the question of Cuban belligerency, the fifty million war appropriation, and the ultimatum

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to Spain. In the matter of the annexation of Hawaii the speaker found himself in a feeble minority and left the chair when the vote on the resolution came up. This action of the House shows that in a time of unusual excitement it will not follow the leadership of a speaker who desires to put a curb on its zeal for action. When such passions come into play, a speaker who does not desire to ride the whirlwind is at a disadvantage; the normal control is destroyed and for a time unrestrained impulse reigns supreme. Compared with the British prime minister, the speaker is at a disadvantage, because, when he does lose control of the House, it is not open to him to appeal to the electorate at large.

The election of Speaker Henderson in 1899, which was uncontested, is of great importance as indicating the hold which the hierarchical principle had obtained in the House. Mr. Henderson had served as a congressman for twenty years, and had been a member of the Committees on Judiciary and on Rules. He was helped somewhat also by sectional considerations, for there had been no Western speaker since Mr. Keifer, and Henderson had the added distinction of being the first speaker to be chosen from the states beyond the Mississippi. But the determining influence after all was to be found in his long service, and in his identification with the new power of the speaker and of the Committee on Rules. To succeed Mr. Reed was not an easy matter, the instrument which he had forged could be wielded only by a man of high ability and power. But the régime of Mr. Henderson was unnecessarily weak, especially as far as the relations

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of the House to the Senate were concerned. His incumbency of office, however, marks another point in the advance of the power of the Committee on Rules. On February 27, 1902, the committee reported that the pending bill for the repeal of the Spanish War taxes should be voted on without amendment. This was done in order to shut out such measures as a bill for the removal of duties on steel and iron, which had an excellent chance of passing as an amendment to the repeal measure. This precedent shows the extent of the power of organization in the House. An amendment ought to stand on a higher plane than mere general criticism in debate, because it ordinarily contains in itself a specific and definite proposal. To rule out the right of amendment was further to emasculate all discussion and to render it purely perfunctory. This was pointed out by the leaders of the opposition who recorded a strong protest, but passed over the bill itself in muteness, disdaining to join in a purely academic discussion.

There were a few other interesting cases of the use of centralized authority in the House during the Henderson régime. Near the end of the last session of the Fifty-seventh Congress an extreme use was made of the power of the speaker to note a quorum present. In dealing with a St. Louis election case, Mr. Dalzell, occupying the chair, amid the protests of the minority, considered as present men who, it is claimed, were not even in the building. Again, in response to the dilatory tactics and filibustering on the part of the minority, on February 27, 1903, the following rule was adopted: "That it shall be in order

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to take from the speaker's table any general appropriation bill returned with the Senate amendments, and such amendments having been read, the question shall at once be taken without debate or intervening motion on the following question: 'Will the House disagree to said amendments *en bloc* and ask a conference with the Senate?' And if this motion shall be decided in the affirmative, the speaker shall at once appoint the conferees, without the intervention of any motion."

But in 1902, on the question of reciprocity with Cuba, the House organization sustained a serious reverse. In Committee of the Whole, on April 18, after a spirited discussion, an amendment was introduced repealing the differential on sugar. Mr. Sherman, as chairman, ruled that the amendment was not germane, giving his reasons at length. By a coalition of the Democrats and the beet-sugar group of Republicans, the decision of the chair was overruled by a vote of 171 to 130. A state of pandemonium followed, while the opposition celebrated its victory by prolonged cheering. A few minutes later, on a not dissimilar amendment repealing the differential on hides, the chair repeated his previous ruling and it was this time upheld by a vote of 183 to 70. Later in the day when the bill came before the House, the coalition victoriously added its sugar differential amendment to the bill by a vote of 199 to 105. In the minority on this question were such prominent leaders as Messrs. Cannon, Dalzell, Grosvenor, Payne, and Hemenway.

The election of Mr. Cannon was predetermined as

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much as that of Mr. Henderson had been. He had even a longer service to his credit, having been in regular attendance for thirty years, and having from the obscurity of an ordinary rural member worked his way into a position of leadership, through native shrewdness and diligent attention to the business of the House. Mr. Cannon was elected as a protagonist against the undue pretensions of the Senate. He had repeatedly expressed his impatience with the methods of the other house. Upon his election he immediately took up the cudgel against senatorial encroachment, the success of which efforts we shall consider in a later chapter. During the Fifty-eighth Congress, the House at times became very unruly. In 1905, the organization was voted down twice. But while his followers had thus departed from the strict dictates of party discipline, it must be confessed that Mr. Cannon had made a precedent for such a breaking of party ties and disregard for party responsibilities, by appealing to Democrats to assist him in passing the navy appropriation bill, when a deficiency of Republican votes threatened that measure. The further breaking down of party differences during the first session of the Fifty-ninth Congress, when an important measure like the railway rate bill was passed with only seven dissenting votes, had the effect of making the resistance to the speaker's authority more general and better organized than it had ever been since the speakership had developed its great authority. The revolt against the speaker's policy in the matter of the statehood bill and of the Philippine tariff, became at times so formidable that it was

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feared that the House organization might be overthrown by a coalition between the "insurgents" and Democratic members. It is indeed evident that as far as positive powers are concerned, new accessions of authority could scarcely be obtained by the speaker. The work to be done at the present time, if the position of the speakership is to retain its influence, is a more careful adjustment of the existing machinery to the needs of the House and to the susceptibilities of its members.

In 1906, the chairman of the Appropriations Committee inaugurated a practice which tends in a measure to restore the control over all appropriations formerly exercised by this committee, and which, if successfully carried out, will constitute another important step toward centralization. He assigned one member of his committee to watch the appropriation bills reported from each of the various committees in charge of special appropriation bills. One member was set to watch the army appropriation bill, another the post-office bill, etc. Should any items appear which under the rules were inadmissible and to which objection could be made on reasonable grounds, the member on guard was to have them stricken out on a point of order. It is evident that the budgetary confusion in the House might be to a certain extent remedied by this simple and effective device. But as might have been anticipated, the members of the House did not take very kindly to this innovation. When Mr. Tawney's committee reported the legislative, executive, and judiciary appropriation bill, the resentment against the committee and its

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leaders expressed itself in an unmistakable manner. As soon as the first sections of this measure came before the House in Committee of the Whole, objections were made to individual items on the ground that there was no previous legislation justifying such appropriations. It is a well known rule of the House that the general appropriation bills are not to contain any new legislation or any appropriation which is not provided for by previous legislation. It was the rule invoked by Mr. Tawney's lieutenants against the measures brought in by other committees, which was now used against his own bill by other members of the House. Item after item was objected to, and as these objections had to be upheld by the chairman, under the rules of the House, a great many sections were stricken out and the entire plan of the Committee on Appropriations was destroyed. The leaders of the committee pleaded in vain against an unreasonable use of the power of raising points of order. The dissatisfied members simply argued that if it was right for the leaders at their convenience to use points of order against the minor committees, individual members could with equal right make use of this instrument even against a strong and favored committee. But the Committee on Appropriations was not yet at the end of its resources, and the result was that the Committee on Rules, on March 28, reported a resolution which perhaps marks the greatest extent to which the power of leadership in the House has ever gone. The resolution provided in substance that no further points of order should be allowed to intervene against the consideration of any section of the

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legislative, executive and judicial appropriation bill, except a section relating to superannuation. It was further provided that it should be in order to insert any provision of the bill which had heretofore been ruled out on a point of order. In supporting this resolution, Mr. Dalzell said that the laws fixing the number of government employees were in most cases old laws. With the increasing needs of the departments, items had from year to year been put into the appropriation bill, which were not actually sanctioned by existing law. This condition was really the fault of the various committees which had not reported the necessary legislation for improvements in the civil service. This defense shows clearly the cumbersome-ness of the entire system of financial legislation. In order to live up to the rules of the House, it would be necessary for some twenty or thirty committees to act, before a legal basis for an adequate general appropriation bill could be laid. But only if they should act in harmony would such a result be possible. Who then is to elaborate the plan which would govern all these committees in their recommendations? Who is to look after the various committees and see that they actually bring in the legislation necessary for the complete realization of the plan? The very cumbersome-ness of this machinery has for years driven the Committee on Appropriations to do what, under the rules of the House, was illegal, but what, from the point of view of the needs of the government, was absolutely necessary. The House conscious of this necessity had tacitly agreed to this continued evasion of the rules, and it was only when the Committee on Appropriation

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tions tried to take a new step in the direction of centralization, that opposition was aroused. The opposition to the resolution reported by the Committee on Rules was naturally very strong. It was pointed out that this was the most radical measure ever proposed by the committee; that there was no reason why one committee should be thus favored by having its bills freed from the impediments of points of order. It was further pointed out that this was a very dangerous precedent, in that, as one hundred members constitute a quorum in the Committee on the Whole, fifty-one members might enact all sorts of legislation unhindered by points of order based on the rules of the House. Under this method of procedure it would be possible to keep in the bill indefensible favors for some of the members of the House and their protégés. But notwithstanding all this opposition the resolution was passed, and the bill was thus freed from all further interference by points of order.<sup>1</sup>

When we consider the rigorous discipline ordinarily enforced by the speaker, we are led to inquire into the rationale of the submission of the House. What is the reason which compels its members to extinguish themselves so utterly, to give up every opportunity of making their individuality felt, and of subordinating themselves, their wishes, and their action entirely to the direction of a few leaders and of the speaker? It is certainly not by choice that the average member submits to such a system. It must, therefore, be the logic of circumstances that has rendered this neces-

<sup>1</sup> For this very interesting discussion, see "Congressional Record," Fifty-ninth Congress, 1st Sess., p. 4507 *et seq.*

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sary. We have already seen that majority rule and the orderly transaction of business could not go on without a strict method of concentration. But there is less opposition and less effort to break away from the constituted authority than we should expect, and the machinery works ordinarily with great smoothness. Of primary importance, in accounting for this state of affairs, is the fact that the leaders of the House in order to make their leadership effective are virtually bound to support the centralized authority of the speaker. The men who, through experience and tact, have acquired positions as chairmen of the important committees, know that their opportunity to make their influence felt depends upon a strong speakership. This alone will secure that orderly procedure which will enable them to get the proper share of the time of the House for the transaction of the business which has been committed to their charge. Their influence stands and falls with that of the speaker. Should the House become anarchical, they would have to struggle for a hearing with the ordinary member on the floor and the advantage of a position gained by long experience and diligent service would be lost.<sup>1</sup> The speaker will place on the prominent committees those men whom he considers the strongest, the most able to gain a following in the

<sup>1</sup> On March 23, 1906, Mr. Payne said: "Gentlemen declaim against the rules of the House, and they want a sort of town-meeting, where every one of 386 members, clamoring for recognition of the speaker, shall receive recognition at the same time to make his motion or to make his speech. They want pandemonium."

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House and to deal effectively with some particular business. These men to a certain extent remain dependent upon him, and he is thus assured of the assistance of the strongest men in the House, who are personally interested in supporting the predominance of the hierarchy. Who then is there to lead and carry out a successful revolt? Suppose fifty or one hundred of the newer members led by younger men of ability should attempt to do so. They must brave the entire constituted authority, "the organization" of the House. They will not even be recognized to speak except at the sufferance of those in power. Every member knows that by revolting he endangers his influence. He loses whatever opportunity he may have for obtaining legislative favors for his constituents. He hazards the possibility of his own preferment, and moreover he runs the risk of being looked upon as a traitor to his party. The success of such a movement in ordinary times is almost unthinkable. Only when the whole House is carried away by some powerful excitement, is the speaker's authority in danger. On the other hand, this situation of apparent autocracy does not permit the speaker to become entirely capricious and arbitrary in his rulings. A certain reciprocity of influence exists between him and the other leaders of the House. He must tactfully arrange to satisfy the heads of prominent committees and the leaders of powerful groups within the House. He cannot carry out an entirely personal and narrow policy, relying solely upon his unsupported authority. But while the leaders will always be consulted, the ordinary member is powerless; and in cases where

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the speaker, pursuing a broad and definite policy, uses the advantages of his position tactfully, he can even coerce unwilling leaders to accept his plans. It is thus the logic of institutions and of political action, not the voluntary choice of any member or majority of members, that has imposed this authority upon Congress and upon the Nation. When Mr. Reed boldly carried out his authority to the ultimate limits, he was the most berated man in the country. Had the question of his assumed power been submitted to a popular vote, he should undoubtedly have been defeated by an enormous majority; and yet the force of circumstances proved stronger than the likes and dislikes of the public, and an authority decidedly unpopular in its beginning is now accepted almost as a matter of course.<sup>1</sup>

Among the pronounced tendencies of development in the House of Representatives, none is more important than that of an organic growth in the matter of the selection of leaders. A sudden rise to prominence and power through brilliant gifts of oratory and debate is unknown in the modern House. The highest rewards are not won by commanding ability or the sustained power of farseeing statesmanship, but rather through shrewdness, tact, industry, and experience. Men who continue in membership session after session, who avoid mistakes, who master the intricate mechanism of committee and House procedure, are almost certain to arrive at a position of

<sup>1</sup> For a violent indictment of the system, see Mr. Moon's speech, "Congressional Record," Fifty-ninth Congress, 1st Sess., p. 4899.

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prominence in the end. All the men who have occupied the seats of power in the House during the last few decades have seen long service.<sup>1</sup> The character of the work of the House is such that it requires moderation, tact, and diligent attention to detail, rather than more striking abilities. The House is not quick to discover and reward great promise in its younger members. This is one of the respects in which the House of Representatives differs most from the House of Commons. Although the meteoric advance of Pitt the Younger is an extreme instance, men rise to prominence and their ability wins acknowledgment much faster in the British Parliament than in Congress. The position of prime minister and the Cabinet offices, indeed, are reserved to men who combine masterly ability with long experience in public affairs. But the parliamentary under-secretaryships, which also afford much opportunity of gaining the attention of the public, are generally filled by younger men of exceptional promise. The cardinal difference, however, lies in the fact that the ablest men of the House of Commons do not look beyond it for the fulfilment of their highest ambitions of public service. Leadership of the House constitutes the highest political honor in Great Britain; whereas the abler members of the House of Rep-

<sup>1</sup> The years of service in the House (including the Fifty-ninth Congress) are as follows: Randall served 28 years, Blaine 13 years, Carlisle 14, Reed 24, Crisp, 13, Holman 32, Cannon 32, McKinley 12, Hepburn 20, Dingley 18, Payne 24, Tawney 14, Dalzell 20, Richardson 22, Roger Q. Mills 19, De Armond 16, J. S. Williams 14.

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representatives are rather disposed to look to the Senate for the culmination of their careers. The hierarchy in the House keeps a firm hand on the reins of power, and permits no one to break into the charmed circle through mere ability. Nor do the rewards of long service in the House equal in attractiveness the opportunities of a senatorial career. It is a remarkable fact that few of the older leaders of the House go to the Senate. In general men go from the more popular to the more select chamber after a comparatively short service in the former.<sup>1</sup> The fact that many of the ablest men in the House are drawn off after a comparatively short service, to enter the other chamber, has a strong influence upon the relations of the two houses. For this reason alone, the opposition of the House to the Senate is less real than that of an elective to a hereditary chamber. We could not expect sincere enthusiasm in a contest against the prerogatives of a senate, which most of the members of the House are secretly or openly hoping to enter at some time. It is rather the older leaders, who derive considerable political importance from their position in the House, who are the most ardent champions of its rights;—men like Mr. Cannon, to whom the House has given

<sup>1</sup> There are of course exceptions to the rule. Roger Q. Mills entered the Senate after 19 years of service in the House; Carlisle and Blaine passed from the speakership to the Senate. Hopkins served 18, Burrows 16, years. But the average is much shorter. Dolliver served 11 years in the House; Bailey, Newlands and Hemenway 10; Dick and Long 7; Lodge, Burkett, Stone, La Follette and Rayner 6; Gallinger, Mallory and Carmack 4; Daniel, Ball, Patterson and Brandegee 2; and Sullivan of Mississippi only one year.

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prominence, and who have passed beyond the period when senatorial ambitions stir them very strongly.

The importance accorded to experience in the business of the House makes appointments to prominent committee positions largely a matter of seniority. It is exceedingly unusual to promote a younger man on a committee over the heads of associates of longer service. Occasionally a strong man is taken from without and placed at the head of a committee.<sup>1</sup> This practice of seniority promotion, together with the fact that the services of clerks of important committees are usually retained for a long time, gives the House that conservative and expert element which it sometimes

<sup>1</sup> E.g. Mr. Overstreet was appointed chairman of the Committee on Post-offices and Post-roads in 1903, giving him precedence over two men who had served sixteen and thirty-two years respectively. The latter were consoled by appointment to unimportant chairmanships. In 1905 the selection of a chairman for the Committee on Appropriations created considerable interest. There were members on the committee who had served fourteen and twenty-six years respectively in the House. The choice finally fell on a member (Mr. Tawney) who had acted in the capacity of a "whip," responsible for keeping the members of the party in line and bringing out the full voting strength on critical occasions. This function, formerly unknown in the House, has been developed as a part of the closer organization. It is significant to note that in Congress a member who performed this useful service has been promoted to the headship of a most important committee, and has thus become one of the floor leaders; whereas in England men who have served the House of Commons in this capacity have never taken a prominent part in parliamentary discussion, but are usually rewarded for their services by a peerage. The difference indicates the importance of machinery and organization in the House of Representatives.

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lacked in the earlier periods of its history. In order to become a leader in the House, a member must be able to retain his seat a long time. Either political conditions must be favorable to such permanency of tenure, as it is in some of the Southern and smaller Eastern states; or the member must be a shrewd politician who knows how to adjust himself to the shifting currents of politics, and to keep his constituents in good humor through political favors judiciously distributed. A mistake in the filling of a postmastership may rob the House of a leader whose usefulness in legislative action is beyond doubt. It is beginning to be recognized by the public that his constituents may materially assist their representative in gaining a position of influence, by retaining the same man in office for a long time. This matter is strikingly illustrated by a comparison of the committee appointments in the Fifty-fourth and the Fifty-eighth Congresses. In the Fifty-fourth, the following states had the largest number of chairmanships: New York ten, Pennsylvania nine, Massachusetts six, Iowa six, Illinois five, Maine four. In the Fifty-eighth Congress: Ohio eight, New York seven, Illinois seven, Wisconsin six, Pennsylvania five, Indiana, Iowa and New Jersey four each. Maine, which in the former Congress was represented by Reed, Dingley, Milliken, and Boutelle, none of whom had served less than seven terms, in the Fifty-eighth had no chairmanship at all, her oldest representative being in his fourth term. On the other hand Wisconsin, which had only one chairmanship in the Fifty-fourth, at which time nearly all its members were new, in 1903 received six chairmanships, which

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went to men who had served from eight to twelve years. The prominence of Ohio in this respect was due to the same cause.

The main consideration, after all, is the effect which the development of this system of hierarchical leadership and of centralized power has on the character of legislation in the House. It must be confessed that it is by no means clear whether the quality of work performed has been much improved by the mechanism so artfully devised. Mr. Reed turned the House into an instrument which he could use for the development of statesmanlike policies. But the system could not fail to a large extent to destroy the self-respect of the House, and to make the average member lose what little of responsibility he still felt for the result of legislation. On account of the stringency of the rules and the power of the leaders to arrange the business of the House, debates have become very perfunctory. It is rarely that the merits of a measure are debated at all carefully on the floor of the House. A debate in the House assumes the character of shrewd fencing for position, of raising and combating points of order, of explaining technical matters, rather than of a discussion of the principles underlying a measure and their application to the facts under consideration. A sharp personal tilt will attract the attention of the House, which is always a grateful listener to sarcasm and witticism. It will also give heed to declarations of policy which may occasionally be made by chairmen of important committees. But the actual subject-matter of legislation receives but scant attention, and it is extremely

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rare for members to engage in an adequate exposition of the bearing of a particular measure. In closing the discussion on the railway rate bill in 1906, the chairman of the Committee on Inter-state Commerce spent most of his time in sarcastic references to another member, while really important matters pointed out in questions from the floor were slurred over or evaded.<sup>1</sup> If a committee chairman entertains the House, avoids committing himself on doubtful points, and keeps his opponents from gaining any tactical advantages, he may be well satisfied. He does not expect to convince anyone, nor does he talk to an audience beyond his immediate hearers. What is to be done in the way of legislation having already been decided by the leaders, it is for the chairman to avoid arousing unnecessary antagonism or placing his side in a position where it may be criticized on the floor of the House. The party in opposition is so manacled that it contents itself with brief protests. So, unless violent differences of opinion exist in the majority party itself, as was the case in respect to the Cuban reciprocity bill in 1902, there is no real debate involving the principles of legislation. In 1901, the Cuba and Philippine amendments to the army bill were put through in an hour's debate; the discussion of the statehood bill in 1905 occupied forty minutes. Nor can it be said that the leaders have used their great power for the purpose of allowing only mature and well-considered measures to pass. The Dingley tariff was rushed through the House, but the Senate

<sup>1</sup> See "Congressional Record," Fifty-ninth Congress, 1st Sess., p. 2468 *et seq.*

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took occasion to add eight hundred and seventy-two amendments. Such measures as the Littlefield anti-trust bill, and the Esch-Townsend bill, however just in their conception, were certainly not sufficiently matured and well enough considered to carry with them the hearty support of the majority that passed them through the House. Measures are often passed for superficial political effect, for the sake of appearance in order to satisfy popular clamor, perhaps in the secret hope that the Senate will tone down their rashness, and give them an acceptable form; or that, if they are defeated, such defeat can be placed on the broad shoulders of the Senate.

The House has developed a machine for producing leaders, but these leaders have not always shown the qualities of statesmanship. Nor have they been able to restrain the House in its inordinate desire to appropriate the public money. It was one of the greatest titles of Mr. Reed to fame that he stood like a wall between the public treasury and the ravenous hunger of the House for appropriations. But private pension bills are more readily passed at the present time,<sup>1</sup> and even the large appropriation bills have not been successfully guarded by the congressional leaders. It is true of Congress, as Mr. Gillett says: "The great difficulty is to find the spot where Congress will agree to economize. Most of the members say they are for economy, and I believe they are sincere, but when it

<sup>1</sup> On one day in January, 1905, 459 bills were passed in eighteen minutes. In 1899, the river and harbor bill carrying appropriations amounting to thirty millions was passed after a debate of ninety minutes.

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comes to applying their principle to any particular case, there is apt to be some special reason against it, and so, while favoring economy in the abstract, they oppose it in practice." So strong is this irresponsible desire for lavish public expenditure, that Chairman Hemenway of the Committee on Appropriations, in 1905, pleaded in vain with the House to avoid squandering the public money at a time when the treasury was facing a deficit of \$60,000,000. And yet the House, when in Committee of the Whole considering the general appropriation bills, pleases itself in the display of a petty and niggardly economy, discussing the smallest items in clerk hire and office expenditure with all the earnestness of a village council. A different spirit prevails when bills for public buildings, river and harbor appropriations, etc. (the "pork barrel" bills), are before the House.

The long continued predominance of one party has not been altogether favorable to the position of the House. It has robbed it of that life and activity which is created by a strong opposition. It has entrenched the hierarchical system without bringing men of commanding ability into the positions of leadership. Mr. Reed for a time made the House important through his own genius. His personal importance transcended his position in the House, which he used merely for the achievement of his broader purposes of statesmanship. The House became important through him, but it lost inner strength. It lost the feeling of dignity and power which had formerly upheld it in the struggle with the other chamber. Under Mr. Reed's successors the inner weakness of the House became more and more apparent.

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How distinctly unfavorable a one-party period must be to the rights of the House, can be understood only after considering the relations of the latter with the Senate. As the Senate is in control of the party machinery, the representatives of a state are frequently reduced to political vassalage. They must look for political support to their senators, and their struggle for the independence and rights of the House will at best be half-hearted. During periods when the House represents a different party from that of the Senate majority, there will be a far more energetic defense of its rights. The nature of this problem, we shall more fully consider in our study of the organic character and the action of the Senate.

## CONGRESSIONAL PROCEDURE

THE procedure in the houses of Congress is regulated in general by the manual of parliamentary practice framed by Thomas Jefferson, and more specifically by the standing rules of each house. The rules of the House of Representatives, together with the decisions of the speaker interpreting them, are a complicated body of parliamentary law.<sup>1</sup> We can, in this place, point out only the general order of business and the most essential rules with respect to debate. The

<sup>1</sup> The precedents are collected in A. C. Hinds' "Parliamentary Precedents of the House of Representatives," Washington, 1899. Mr. Hinds has for a long time been clerk at the speaker's table, and is an authoritative adviser on matters of parliamentary procedure.

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regular order of business in the House is fixed as follows:

1. Prayer by the chaplain.
2. Reading and approval of the journal.
3. Correction of reference of public bills.
4. Disposal of business on speaker's table.
5. Unfinished business.
6. The morning hour for the consideration of bills called up by committees.
7. Motions to go into Committee of the Whole House on the state of the Union.
8. Orders of the day.

Business on the speaker's table includes, among other matters, messages of the President and Senate bills. A Senate bill on the speaker's table can be called up directly if it is not of such a nature as to require reference to a committee, or if a substantially similar bill has already received the approval of a House committee, or if any committee requests that it be called up. The expression "morning hour" in the rule, referred originally to an actual hour of sixty minutes; under the present rules, however, the business of the morning hour may continue for a longer time unless interrupted at the end of sixty minutes by a privileged report, or by a motion to go into Committee of the Whole House on the state of the Union. The business of the morning hour consists of general bills called up by committees. The consideration of money bills and of private bills is almost always had in Committee of the Whole House. Bills which have been reported back from the com-

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mittees are placed on one of the three calendars, namely:

1. The Calendar of the Committee of the Whole House on the state of the Union (Union Calendar), to which are referred bills raising revenue, general appropriation bills, and bills of a public character directly or indirectly appropriating money or property.

2. The House Calendar, to which are referred all bills of a public character not directly or indirectly appropriating money or property.

3. The Calendar of the Committee of the Whole House (Private Calendar), to which are referred all bills of a private character.

But these calendars constitute merely a record of the business that is regularly before the House; the bills are not necessarily, or even frequently, called in the order in which they appear on the calendar; the Union Calendar, for instance, has not been called for more than ten years past.

As stated, after an hour has been devoted to the consideration of general bills, it is in order to entertain the motion to go into Committee of the Whole House on the state of the Union, or, when authorized by a committee, to go into Committee of the Whole House to consider some particular bill. When no particular bill is designated, it is understood that revenue or appropriation bills will be discussed in Committee of the Whole. When the committee is to be called for this latter purpose, a motion to that effect has precedence over even the business of the morning hour, and such a motion may even be made on those

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days which by the rules have been set apart for special business. The House, on going into Committee of the Whole, frequently fixes the time to be devoted to general discussion. In Committee of the Whole, one hundred members constitute a quorum.

The regular course of business in the House may at any time be interrupted by privileged reports which may be made by certain committees. The committees entitled to make privileged reports, and the subjects upon which such reports are allowed, are the following: the Committee on Rules, on rules, joint rules, and order of business; the Committee on Elections, on the right of a member to his seat; the Committee on Ways and Means, on bills raising revenue; the committees having jurisdiction of appropriations, the general appropriation bills; the Committee on Rivers and Harbors, bills for the improvement of rivers and harbors; the Committee on the Public Lands, bills for the forfeiture of land grants to railroads and other corporations, bills preventing speculation in the public lands, and bills for the reservation of the public lands for the benefit of actual and *bona fide* settlers; the Committee on Territories, bills for the admission of new states; the Committee on Enrolled Bills, enrolled bills; the Committee on Invalid Pensions, general pension bills; the Committee on Printing, on all matters referred to them of printing for the use of the House or the two houses; and the Committee on Accounts, on all matters of expenditure of the contingent fund of the House. Reports of conference committees are highly privileged by always being in order, except when the journal is being read,

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when the roll is being called, or the House is taking a vote. A conference report may be made in interruption of a member who is occupying the floor for debate, or during the time set apart for a special order. Other privileged reports do not take precedence over a special order. The manner in which the reports from the Committee on Rules are protected has already been considered.

On account of the pressure of general business it is common to assure important bills sufficient and speedy consideration by making them a special order for a certain day. As this procedure, however, constitutes a change in the established order of business, it amounts to a change in the rules, and can be adopted only in the manner prescribed for such action. For this reason the order of business is largely determined by the Committee on Rules, by whom changes in the rules must be reported in order to come before the House. It is the usual practice in the resolution for a special order, to fix the time when the final vote on the measure concerned shall be taken. Special days are set apart for the consideration of particular business, as follows: Friday of each week, for private bills; the second and fourth Monday of each month, for bills reported from the Committee on the District of Columbia; the first and third Monday of each month, and the last six days of the session, are known as "suspension days"; on these days any motion to suspend the rules will be in order, private members being given the preference on the first Monday and committees on the third Monday of the month. A motion to suspend the rules requires a two-thirds

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vote, and forty minutes' debate is allowed on such motion.

Debate in the House is regulated by a very complicated code of rules. No member is allowed to occupy more than one hour in debate, nor may he speak more than once upon any proposition unless he is the introducer of the pending matter, or the member reporting a measure from a committee. It is however permissible for members who have spoken on the main question to speak again on an amendment. During debate in the House, a member must confine himself strictly to the subject under discussion, but this is not the rule during general discussion in the Committee of the Whole House on the State of the Union. A member who has been recognized by the Speaker and who has the floor cannot be interrupted by a motion to adjourn. He may yield a part of his time to other members for purposes of explanation of a pending measure, but if he allows an amendment to be offered in this manner he loses control of the floor. In Committee of the Whole, the time for the general debate having been fixed by the House, the committee is powerless to extend it even by unanimous consent. After the general debate in Committee of the Whole is closed, amendments may be offered under the rule limiting the speeches on such amendments to two of five minutes each. It is a common practice under this rule, in order to discuss any particular provision, to move to amend by striking out the last word of the clause involved. On any motion to suspend the rules, or when the previous question has been ordered on a proposition on which there has been no debate, forty

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minutes of debate are allowed, which time is divided equally between the supporters and opponents of the measure. Like all legislative bodies, the House may at any time absolutely modify its methods of procedure by unanimous consent.

The order of business in the Senate is as follows:

1. Prayer.
2. Reading of the journal.
3. Presentation of petitions, reports, etc., and introduction of bills and resolutions (morning business).
4. Bills and resolutions may be taken up from the calendar, if there is no objection, and discussed under the five-minute rule.
5. Not later than two o'clock the Calendar of General Orders is taken up, which contains all measures regularly before the Senate.

When called up, a measure on this calendar which has not been made a special order, or has not been taken up from the calendar in the morning hour without objection, may be subjected to any kind of treatment. It may be recommitted, passed over, postponed, or placed at the foot of the calendar; or it may be debated, amended, and voted on. As there is no controlling committee in the Senate, the time when a vote is to be taken is fixed by agreement between both parties. As in the House, money bills are given a privileged status. All bills and resolutions which have received two readings are considered by the Senate under the procedure of a committee of the

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whole, although the Senate does not actually go into Committee of the Whole; under this procedure no motions are entertained upon such measures except propositions for amendment. When a bill is introduced into the Senate "by request," the senator introducing the measure thereby indicates his desire not to be held responsible for the same.

In 1910 and 1911, a revolt took place against the power of the Speaker, with the result that the rules were modified in several respects, and the authority of the Speaker was greatly curtailed. The standing committees of the House were made elective, including the Committee on Rules; the membership of the latter was enlarged to ten, and the Speaker was excluded from it. He still has the powers necessary for the orderly transaction of business, among them the power of recognition; but this has been somewhat limited by establishing the Unanimous Consent Calendar and The Discharge of Committees Calendar, upon both of which motions are placed in the order of application by members. The effect of the changed rules is not yet entirely apparent; while they have substituted the power of a group of leaders for the monarchical authority of the Speaker, they do not attempt to secure for the individual representatives the freedom in debate and the power of initiative enjoyed by members of the Senate.

## CHAPTER III

### THE SENATE

WE have been accustomed to look upon the era of 1787-1789 as of such transcendent importance that its labors and achievements would probably not be equaled in the course of our national experience. And yet the present bids fair to rival that great constructive period, and the relations which it is called upon to adjust are even deeper of reach than those matters of institutional form which were settled at the earlier epoch. For the present age deals with the co-ordination of our established political system, democratic in form, with the powerful economic and social forces which the recent past has brought forth and which are oligarchic in their tendency. We are living in an age in which new social categories are being established. It is no longer the form, but the substance of political and social life that is being affected, through the creation of new groupings of power, and through a new correlation of influences acting directly upon social and economic life. In this era, the Senate becomes of particular importance, because it, of all our political institutions, is most representative of these great economic forces which are seeking mutual ad-

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justment, and are struggling for mastery over our national life in all its phases. In the settlement of these impending problems, much will depend on the complexion, the attitude, and the wisdom of the Senate, for this body is by its constitutional purpose called upon to occupy a mediatory position. Should it, however, narrowly interpret its function as being representative of special economic interests, its importance will ultimately be impaired, and its great opportunity lost. Such a result would be a national calamity because the opportunities of the Senate to be a successful mediator between conflicting forces are not equaled by any other political institution; and should the Senate definitely become the out and out advocate of certain particular interests and tendencies, the nation cannot avoid a bitter civil struggle, in which all mutual understanding of the forces engaged will be lacking, and which may lead to almost any length of disturbance and disaster. These facts constitute the basis of the real importance of the Senate at the present time.

Senator Lodge has repeatedly argued that the powers of the Senate have not increased during the last hundred years, but are practically the same as those exercised by that body at the beginning of our history under the Constitution. It is of course easy to find early instances of the exercise of the powers connected with appointment, treaty-making, and money bills, as well as to derive these powers from our constitutional system by a process of logical deduction. Yet as soon as we consider the actual manner in which these powers were exercised and the temper

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which animated the action of the Senate, it seems impossible to avoid the conclusion that there has been effected, in favor of the Senate, a very substantial increase of actual power and authority. As a matter of fact, its powers were originally exercised in isolated cases, without that systematic co-ordination and constant use which has tended to place all the controlling threads of governmental machinery in the hands of the Senate. The use made of the power of confirmation alone, has been sufficient to give the relations between the Senate and the President a character which they certainly did not have in the earlier days.

Moreover, the basis on which the political authority of the Senate rested during the first decades of our government, was entirely different from that which has resulted from the events of the great civil struggle. In the earlier years senators were looked upon as ambassadors of their respective states, limited in their individual discretion, and subject to instructions from the legislatures which had elected them. The great powers accorded the Senate at the beginning of our government under the Constitution, therefore, had their reason in the federal nature of the Union. The Senate was powerful not so much as Senate or as a legislative body, but as the representative of the sovereignties of the individual states. At first sight, it would therefore seem natural that the Senate should have suffered a loss in importance with the gradual decline and final overthrow of the principle of State Rights. But its powers were saved and actually augmented through what we may call a sub-

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stitution of causes. In political history it often occurs that an institution created for a certain purpose, and exercising certain functions to that end, may retain its powers though the basis and source thereof is shifted. So, though the States' Rights view of the Federal Government was defeated, the Senate nevertheless increased in power because it had already gained a historic position as a legislative body. Its actual power, which it now wields *qua* Senate, rather than *qua* representative of the sovereign states, is founded primarily upon the fact that it possesses great permanence, experience, training, and close connection with powerful interests and organizations.

There have thus far been three fully rounded periods in the historic development of the Senate. During the first era, which covered the period down to 1825, the Senate may be likened to a planet, receiving its light from other bodies. It acted as an executive council to the President, and as representative of the state legislatures; but, in and of itself, it was not regarded as of equal importance to the state legislatures, or to the House of Representatives. Clay, though elected to the Senate, chose to make the House the field of his political action, and men even preferred leadership in the state legislatures, to what was considered the somewhat empty honor of the senatorial dignity. During the second era, which extends down to the close of the Civil War, the Senate, through the presence in it of a galaxy of brilliant men, established a claim to intellectual leadership of the Nation in political matters. The advantages of its position were realized and made use of with so much effectiveness

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and so much dignity, that the Senate became famous among the legislative bodies of the world. The Senate first attracted general public attention through its dramatic struggle against Jackson. The fact that the dictator was not permitted at will to mould the policy of this body, that in fact all effective opposition to him was there centered, made a great impression upon the public mind. Though the Senate did not succeed in gaining the upper hand against him, its influence was greatly augmented, and the weaker men who followed Jackson in the presidency, were forced to admit its power. During the two decades after the war, the Senate was unrivalled and undisputed in its sway. It succeeded in wrecking the independent policy of Johnson; and the senatorial group, the first approach to a political syndicate we have had, making use of the inexperience of Grant in matters of civil government, were able to impose on him their point of view. Though thwarted in isolated instances by Hayes and Garfield, the senatorial government did not meet a powerful rival until Mr. Cleveland became President. In the fourth period, during which the observations of our present study are made, the Senate has changed in complexion through the introduction of a large number of men directly connected with great economic interests, while the older type of lawyer-statesman is growing scarcer. The inherent possibilities of senatorial power have been more fully realized than ever before. The mutual relations of the various powers of the Senate have been worked out in practice, with the result that this body has achieved a distinct political primacy. In this it has

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succeeded not only through the direct exercise of powers granted to it by the Constitution, but through its extra-constitutional relations with the national and the state party organizations, and through the individual connections of its members with powerful economic influences. In the place of the idea that the Senate represents the sovereign states, there has been developed the thought that it is directly representative of political experience, and of the interests of property,—that is, of the conservative elements in the State. As we are now in an era of unprecedented economic development, in which permanent groupings of vast interests are being effected, leading to a hitherto unsuspected concentration of economic power and embodying an entirely new synthesis of economic forces, it is evident that an institution in which these elements, of late so prominent, are primarily represented, and which is in close touch with them, will be of the greatest weight in the settlement of future economic and social relations.

Thus far the philosophy which inspires the action of the Senate has remained as individualistic as that of the Supreme Court; and indeed there are perhaps even fewer dissentients from the traditional individualistic doctrines among the senators than among the judges of our federal tribunals. The controlling point of view of the Senate is still distinctly that which requires the fullest liberty of the individual to gain wealth and power, and which looks with suspicion upon any attempt of the State to curtail the rights of men in dealing with their property. No other philosophy could for the present be expected in

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a body composed of successful men, who have gained their prominence under a system of unrestrained competition. And it is not surprising that they often shut their eyes to the fact that this theory has become anachronistic and that it is incongruous with the existence of concentrated economic power which threatens every opportunity of individual enterprise. It is exactly in behalf of the interests and activities of these large aggregates of capital that the individualistic theory is at present invoked. This dominant point of view lays the Senate open to the criticism of being too favorable to the unrestrained power of concentrated wealth, and of not weighing impartially the advisability of increased governmental control over economic agencies. Conservative and intelligent criticism of the Senate will not attach itself to the fact that its members are connected with important economic interests, still less to the individual wealth of many among them, but rather to the spirit of the Senate, to its uncompromising defence of class interests. The Senate is constantly tempted to resort to a merely obstructive policy, because such action not only displays its influence, but appeals to its ideal of conservatism. Any measure which in the remotest manner trenches upon the interests of concentrated wealth, which in the least impedes the activities of great corporations, has a hard road to travel in the Senate. No matter how insistent may be the popular demand, no matter what expert consensus may call for such legislation, it will be ignored or endlessly delayed by the Senate, and if allowed to pass, will ordinarily be equipped with a few unobtrusive amend-

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ments which, however, are often efficacious to defeat its main purpose. Should this tendency prevail, should the Senate allow itself to become chiefly a vetoing agency, the result will be equal to a national calamity. It is a revolutionary act to oppose healthy growth, to shut off active currents of development; and the Senate which by its high position is called upon to mediate between classes and between interests, is in need of a broader philosophy, of more liberal temper, than many of its recent actions indicate. Through constantly favoring certain interests, it would sharpen existing antagonisms, and might ultimately threaten the bursting of constitutional restraints and the attempted creation of new and more popular authorities. Moreover, the Senate ought, from its own point of view, to consider that no political body can retain permanent influence and power through a purely negative policy. For the sake of the preservation of the usefulness of this admirably conceived political institution, it is to be hoped that the Senate will avoid the danger of becoming more and more irresponsible to the really deep needs and impulses of the people. The Roman Senate which at one time came near to fulfilling every ideal of temperate and far-seeing government, irrevocably yielded its own supremacy, when it made itself the instrument of an oligarchic policy. A more detailed examination of the powers of the Senate, and of the tendencies of its action, will make clear its great opportunities for leadership, as well as the dangers which beset its future development.

The Senate has the power of giving or withholding

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its consent to Presidential appointments to office. This function was originally understood to be the rather negative one of preventing inadvertent appointments; in the words of Jefferson, "the Senate is only to see that no unfit person is appointed." Speaking of the appointment of a diplomatic officer, Jefferson divided this function into five steps: (1) fixing the destination, (2) determining the grade, (3) nomination, (4) confirmation, (5) commission. Only in the fourth step does the Senate participate. It has, according to this earlier view, nothing to do with the original selection or nomination of candidates.<sup>1</sup> The present practice according to which senators in most cases determine the nomination, came into regular use under the weaker Presidents that followed Jackson. It was continued during the Civil War, when Lincoln, weighed down by cares of state, turned over matters of patronage to the senators and representatives; and ever since, the control of federal patronage by the Senate has been quite steady. Under the rules of senatorial courtesy, the Senate refuses to ratify a nominee opposed by the senators of his state of residence. In order to avoid such opposition, the President is obliged to consult beforehand the senators interested in a certain appointment. It may be argued that this is the only reasonable custom, as it is impossible that the President should be acquainted with the qualifications of applicants for office from all parts of the Union, and therefore that he would naturally seek the advice of men more familiar with local

<sup>1</sup> Jefferson, "Opinion on Powers of Senate," 1790. Works (Ford ed.), vol. V, 61.

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affairs, before sending in the nominations. But the roots of the practice lie deeper. Many senators, in the decade following the war, came to realize that it was essential to their continuance in power that they should control the political organization in their respective states. Nor were they slow to see that the readiest means of control lay in their hands through their power over federal appointments. But also as senators, members of a legislative house, they realized the advantage of power to be gained by keeping a strict control of the political preferment that can be granted by the Executive. When, however, the senatorial group directly and openly attempted to make the President merely an executive clerk for the registration and reporting of senatorial nominations, they went too far, and the Presidents succeeding Grant rebelled against this practice. President Hayes was supported against the demands of the Conkling group by the Democratic senators, and President Garfield appealed successfully to the people and legislature of New York against the radical attempt of Conkling and Platt to control the federal patronage in that state. During the administration of President Hayes, ninety-two nominations were contested, of which fifty-one failed of the necessary majority in the Senate.<sup>1</sup> This is by far the largest number of objections to presidential appointments in the Senate during any one administration. But throughout the period from Grant to Cleveland, the number of contested cases was large; though, through Garfield's victory over Conkling, the principle of the control of the several senators over

<sup>1</sup> Fish, "Civil Service and Patronage," p. 204.

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the patronage of their respective states received a certain limitation. Though there have been no attempts since to impose this policy in so direct a manner upon any President, it has nevertheless remained the general practice of Presidents to consider the wishes of the senators interested before sending in nominations. During the period under consideration the Senate also made extensive use of its privilege to ask for specific information in regard to the nominees. The resolution of April 8, 1878, which asked for information concerning the residence of nominees, was a part of the policy of the senators to retain control of nominations which in any manner affected their localities. During his second administration, Mr. Cleveland encountered the strenuous opposition of the senators from New York to the nomination of Mr. Hornblower and later of Mr. Wheeler Peckham for the position of associate justice of the Supreme Court. Unable to overcome this antagonism, he neatly turned the position of his opponents by sending in the name of Senator White of Louisiana, whose appointment was immediately confirmed as a matter of senatorial courtesy.<sup>1</sup>

During the period of senatorial government after the Civil War, the Senate, under the tenure of office act of 1867, controlled not only the appointment but also the suspension and dismissal of "presidential" officials. The act provided that the suspension of an official during the intermission between legislative

<sup>1</sup> There have been several cases in recent years of the destination of appointees being changed in deference to the wishes of senators.

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sessions should be submitted to, and ratified by, the Senate at the next succeeding session, in default of which ratification the suspended official was to be reinstated. After Grant's election, the act was amended to the effect that in case of a suspension, the new appointment should be ratified or a new nomination made to the position vacated.<sup>1</sup>

While therefore, under the law of 1867, the former incumbent is only conditionally suspended, and will be re-instated in case the Senate refuses to concur in his suspension, the amendment of 1869 leaves the matter of suspension entirely at the discretion of the President, and confines the attention of the Senate to the confirmation of the new incumbent. The logical consequences of this amendment were, however, not fully drawn until Mr. Cleveland's struggle with the Senate in 1887. Mr. Cleveland had removed a certain official, and had sent the nomination of his successor to the Senate for confirmation. The Senate attempted to go into the matter of the removal, still clinging to its right to review a suspension under the tenure of office act. Various committees of the Senate made demands upon executive departments for information concerning the removal. Under instructions from the President, the transmission of the papers in question was refused. The Senate finally passed a resolution of censure upon a member of the Cabinet for not furnishing the desired information. This gave President Cleveland an opportunity for

<sup>1</sup>"That if the Senate shall refuse to consent to an appointment in the place of any suspended officer, then . . . the President shall nominate another person to said session of the Senate."

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stating his position in a special message, in which he said:

"The requests and demands which by the score have for nearly three months been presented to the different departments of the government, whatever may be their form, have but one complexion. They assume the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and Executive function, for which I am solely responsible to the people, from whom I have so lately received the sacred trust of office."

The President further argued that private and confidential papers, having reference entirely to such Executive acts as are placed by existing law within the discretion of the President, did not change their nature into public documents just because they are in the custody of a public department. The opposition of the Senate in this case stood upon particularly weak ground, as the term of the official in question had expired by statutory limitation before the controversy arose. The final outcome of the matter was that the Senate retired from its position and, in December, 1886, passed a bill entirely repealing the tenure of office act and restoring the practice of the government as it had been before 1867.

In connection with the supervision of Executive work by the Senate, the right to get documents and other information from the departments is of great importance. A writer on the subject summarizes his conclusions as follows:

"Although there should be cogent reasons for a compliance with the congressional demand for in-

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formation, yet compliance would be a matter wholly within the Executive discretion. It is certainly reasonable to refuse whenever public interests or even the rights of individuals require it. But in every case, whether or not a reason exists, it is clear that the peculiar structure of our government gives the Executive the absolute power to refuse as long as the struggle is carried on under the Constitution. Whatever may be the advantages of this co-ordination of forces, it certainly brings about an unfortunate clash-ing of authority. It indicates an amount of friction in the governmental machinery which, even if unavoidable, is certainly undesirable."<sup>1</sup>

President Cleveland successfully maintained the position that matters pertaining to a question of Executive discretion need not be submitted upon request of the Senate. He also drew a distinction between public documents and matters of a personal or confidential nature. These are rather broad categories, and the distinctions between them have not as yet been carefully worked out. But it would indeed seem that the Senate is powerless in its demand for information, whenever the President sees fit to declare that the matter is one of Executive discretion, or that the materials involved are of a personal or confidential nature. The only recourse of the Senate in such a case is in a general political opposition to the President. It would of course, in general, be impolitic for the President to refuse to give full information to Congress. But there is no legal ma-

<sup>1</sup> Mason, E. C., "Congressional Demands upon the Executive for Information." Papers Am. Hist. Assn., V. 375.

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chinery for forcing the transmission of specific information which the President may desire to withhold on account of the reasons above mentioned. The prevalent view in the Senate is shown by repeated colloquies in the extra session of the Senate in 1905, in which a number of prominent senators took part. According to the opinions there expressed, the Senate may direct any of the Executive departments to furnish it information, in accordance with the laws by which they are created, always excepting the Department of State, which on account of its peculiar function and the law from which it takes its origin is not classed with the other departments in this respect. While the Senate "directs" the departments to furnish desired information, in dealing with the President, it "requests . . . if not inconsistent with the public interest." This distinction in form is of course due to the fact that the President holds his powers under the Constitution, while the departments are in the main the creatures of legislation. Notwithstanding the limitations in its power to demand information, the Senate is nevertheless in a position to carry out a very strict supervision of the Executive departments. Through their control over appropriation bills and administrative legislation, the committees of the Senate which deal with the business of the departments exercise a controlling influence, as their ill will or opposition to a governmental department may very materially interfere with its effective working. The attempts of the Senate to control Executive discretion by specific legislation have, however, not always been well conceived. Thus, in 1897, the Senate

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endeavored by an amendment to the sundry civil appropriation bill, to nullify Mr. Cleveland's order regarding forest reserves in the West. In this instance the Senate allowed powerful and grasping private interests to outweigh considerations of permanent public welfare. The House, more far-seeing in this matter, defeated the Senate amendment, and thus made the continuance of forest preservation possible.

The masterly conduct of foreign affairs during the principal period of its history is one of the first titles to fame of that "Assembly of Kings," the Roman Senate. The Senate of the United States, through its power to give or withhold consent to treaties, is aspiring<sup>1</sup> to a similar control of the foreign affairs of the Nation. Not satisfied with the rather negative power of refusal to consent to treaties which it may consider unwise, it is taking a far more active and positive part, through a strict supervision by its Committee on Foreign Relations of the negotiation of treaties, and through a liberal use of its power of suggestion and amendment. The idea which was before the eyes of the framers of the Constitution when they established this particular power of the Senate was that of an executive council, a body which the President would take into his confidence in the negotiations in question. In the earlier period of our history and until quite recent times, the Senate did not attempt to take the actual conduct of foreign affairs

<sup>1</sup>Not indeed with a conscious design to usurp power, but with the instinctive tendency of every public body to extend the boundaries of its jurisdiction.

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into its own hands. During the first decade of government under the Constitution, the relations of the President to the small council which the Senate then was, were of an intimate nature; and even when the Senate increased in numbers, the relations between the Senate and the Department of State, were generally close enough to make it natural for the former to repose free confidence in the secretary of state. He was accordingly permitted to carry on foreign negotiations and to mature foreign policies and treaties without fear of having his ultimate results overthrown by hostile action in the Senate. During the first decade the President himself several times attended the consultative meetings of the Upper Chamber.<sup>1</sup> From Monroe's secretaryship of state in 1811, down to the resignation of Mr. Blaine, that position was held constantly by men who had been United States senators, with the exception of brief interregna, covering altogether less than one and a half years, and with the exception of the term of William M. Evarts, who became a senator later in his career. Since the resignation of Mr. Blaine, an entirely new system has come into use, Senator Sherman being the only secretary of state who had also been a member of the Senate. Under these circumstances, it is not surprising that there should have been more friction between the President and the Senate on foreign matters than existed during the earlier years of our national life.

Such constant friction as has during recent years

<sup>1</sup> The attitude of that body on these occasions did not, however, encourage the continuation of this practice.

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existed between the Senate and the Department of State is, in fact, unprecedented in our national history. It began under Mr. Cleveland's régime, when the Olney-Pauncefote arbitration treaty was rejected, partly on account of the unpopularity of the Administration, partly on account of a strong political opposition to any arbitration arrangements with Great Britain. Even under McKinley, notwithstanding the unusual relations of friendliness between that President and the Senate, the most important treaties submitted by the Department of State were rejected or modified by the Senate. Again it proved impossible to have a British arbitration treaty ratified. The Hay-Pauncefote canal treaty failed, and this was also the fate of several important reciprocity treaties. The arguments used to defeat the latter give proof of the occasional narrowness of senatorial statesmanship. One of the strongest objections to the French reciprocity treaty urged by certain Eastern senators, was that the cheap jewelry business in this country might be thereby threatened. The Senate has continued this critical attitude with the result that no important treaty has been allowed to pass without such modification as has often entirely destroyed its original purpose. The only exception is the Treaty of Paris, in the formation of which individual senators had taken a prominent part. The Newfoundland reciprocity treaty was ruined through the interference of special interests. The quarries and mines of West Virginia and the fishing industry of Gloucester, Massachusetts, were successfully defended by individual senators, and the Senate as a body did not

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seem to be strong enough to rise to a broader view of the general welfare and to force special interests into a proper perspective.

But the most important controversy that has ever occurred between the Senate and the Executive on the matter of foreign affairs, is that concerning the general arbitration treaties (1905), because it raised the issue as to the proper functions of the Executive in international matters. The Senate objected to these treaties as being too indefinite in statement, and as giving an altogether too wide discretion to the Executive, which might virtually be used to deprive the Senate of its share in the supervision of foreign affairs. The treaties submitted provided that "any matters legal in their nature and not affecting the honor and vital interests of the Nation," should be submitted to arbitration, under "a preliminary agreement setting forth the cause of the controversy." It was urged that these treaties would confer upon the President the power to determine what cases should be submitted to arbitration. The limiting phrases used are so general in their nature that their application depends upon the interpretation given to them in any particular case. Whereas they would leave the government free to refuse to arbitrate any controversy on the ground that it regarded the subject-matter as important enough to involve its honor and its vital interests, the laxity of the limitations would, on the other hand, enable the President to submit to arbitration, without the consent of the Senate, matters of similar importance by simply declaring that, in his opinion, they did not affect the honor and vital

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interests of the Nation. It was further argued by senators that the limitation requiring the controversy to be legal in its nature would not be effective, as it would be difficult to conceive of an international controversy into which legal matters do not enter. As far as the wording of the treaties is concerned, there was nothing to prevent the President from submitting to arbitration such questions as those concerning the Newfoundland fisheries, the Alaska boundary, and even the navigation of the St. Lawrence. The only restriction upon his discretion would be found in such general political opposition as might arise to any particular arbitration. The Senate was first made aware of these dangers to its powers through the objections of certain Southern senators, who expressed the fear that, under the treaties, old pecuniary claims against their states might be revived. The Senate therefore voted to substitute the word "treaty" for "agreement," and thus made it incumbent upon the President to submit to the Senate for ratification every individual matter to be brought before the Hague tribunal.

There was a precedent for this action, in the manner in which in 1900 the Senate had amended a treaty with Great Britain on the tenure and disposition of real and personal property. The treaty provided that any British colony might adhere to it on notice of the British ambassador at Washington to the secretary of state; and any American possession, upon notice being given by the representative of the United States at London, "by direction of the President." The Senate amended this so as to read "by direction of the treaty-making power of the United States."

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Considering the comparatively petty interests involved in this amendment, the attitude of the Senate was certainly lacking in that liberality which ought to prevail in the mutual relations of two departments so closely allied in functions as the Senate and the Executive.

Thus far the Senate had not formally relinquished the right of calling up any individual case of Executive action, and judging of its propriety on its own merits; diplomatic action through agreements had, in fact, taken place with the tacit consent of the Senate. The Senate feared that through ratifying the arbitration treaties in their original form, it would yield this power of revision, and would give permanent legal sanction to the independent action of the Executive in settling important international affairs without reference to the general treaty-making authority. On the other hand the President, who had through custom acquired the practical right of settling minor matters and of making preliminary arrangements through Executive agreement, felt with justice that, under the present conditions of international intercourse, diplomatic action could hardly be efficient, were it dependent entirely upon treaties lengthily discussed and solemnly acted upon in the Senate. In the consideration of the arbitration treaties, no practical solution was presented. It was not found possible to work out a form of statement, which would assure the Senate that matters of real importance would always have to be submitted to it, and which would at the same time leave to the President the necessary freedom of diplomatic initiative.

The action of the Senate on the arbitration treaties,

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which in their amended form were not accepted by the President, cannot be taken as final. The demand for the arbitration of ordinary international controversies is so strong that some means will undoubtedly be found, by which a general treaty will be rendered possible and acceptable. A system under which even the smallest subject of international litigation will have to be passed upon by the Senate, is too cumbersome to be endurable; it is also impracticable from the point of view of the Senate as it would cause the expenditure of too much time and effort. The objection that the Constitution does not permit the Senate to entrust to the President the submission of such matters to the Hague tribunal, is not generally considered of any force. But the Senate may reasonably demand a more careful definition of the classes of cases which the President shall be empowered to submit to arbitration by simple agreement. The previous practice of our government would indicate that claims of private persons against foreign governments for indemnities, could safely form one of the classes thus left entirely to Executive action. The course of the Senate in this controversy can thus not with justice be denounced as entirely unreasonable, however reactionary it may at first sight appear.

The issue between the Senate and the President upon the arbitration treaties was complicated by the diplomatic action in respect to San Domingo. The San Domingo protocol of January 20, 1905, which was submitted to the Senate only upon its special request, was by its terms to have gone into effect twelve days after the above date. The fact that such a radi-

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cal departure in our foreign policy should have been attempted in this hurried and informal manner brought about a critical and searching discussion of the practice of making diplomatic arrangements with other nations by means of protocols and agreements of a purely Executive nature which had never been submitted to the Senate for its ratification. The custom had gradually grown up to settle less important matters, especially claims of private citizens against foreign governments, by such agreements. As a matter of fact some very important international settlements were made in this manner. The distinction between a treaty and an Executive agreement as worked out in practice, is that a treaty is a solemn act confirmed by the Senate, which, under the Constitution, becomes the law of the land, and by means of which the important foreign relations of the Nation are settled; whereas an agreement is properly an Executive act, by which preliminary arrangements are made or minor differences are adjusted. This is evidently a purely formal distinction, which does not in itself clearly define the proper boundaries of either manner of action. When the President makes an Executive agreement, he himself judges of the relative importance of the matter involved, and though the practice rests upon the tacit concurrence of the Senate, very many important matters were in fact withdrawn from senatorial scrutiny by this manner of procedure.<sup>1</sup> The following are among the more notable examples of matters settled by Executive agreement: the limita-

<sup>1</sup> For the history of this practice, see J. B. Moore, "Treaties and Executive Agreements." *Pol. Sc. Quarterly*, XX, 385.

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tion of armaments on the Great Lakes (1817); the cession of Horseshoe Reef on Lake Erie to the United States (1850); the peace protocol with Spain assuring the cession of Porto Rico (1898); the Peking protocol settling such highly important matters as the indemnity to be paid by China, the rights of legations within the Empire, etc. (1901). Under special acts of Congress, certain Executive agreements with other nations may be made concerning the postal service, reciprocity, discriminating duties, copyrights and trademarks. The settlement of pecuniary claims of individuals against other nations has been quite generally carried out by Executive agreements. Of this nature were the Delagoa Bay arbitration of 1891; the settlement of the Mora claims against Spain in 1886; the submission of the Pious Fund cases to the Hague tribunal in 1902—the latter being the direct precedent for Executive action in connection with international litigation before the Hague tribunal; the settlement of the claims of the San Domingo Improvement Company against the negro republic in 1902; in the same year, the submission of American claims against Venezuela to a mixed commission. The San Domingo protocol of January 20, 1905, is altogether the most striking instance of the use of Executive agreements in international affairs. Under this protocol the United States undertook to guarantee the integrity of San Domingo, to adjust the pecuniary claims of foreigners against that republic, to administer its finances, and to assist it in maintaining order.

The failure of the Senate to ratify the San Do-

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mingo treaty left the President in a position where he had to decide, upon his own responsibility, how far the policy of that treaty should be carried out by him without the consent of the Senate, at least during the period which would intervene before a ratification could be secured. The President did in fact adhere to the main lines of his policy; he recommended Americans to the government of San Domingo for appointment as revenue collectors; he selected, through the secretary of war, an American bank in which to deposit the 55% of the collected revenue which was to be set aside for the benefit of creditors, and he gave the moral support of the United States to the execution of these measures, through the presence of American warships in San Domingo ports. When the President, in 1906, was attacked in the Senate for having on his own authority substantially carried out the policy of the treaty which the Senate had refused to ratify, his course of action was very strongly defended by several Republican senators, who argued that the provisions of the treaty were broader than the action of the President, and that he had been simply exercising his own constitutional powers.<sup>1</sup>

The indecisive attitude of the Senate affords great encouragement to the strengthening of the magisterial power of the President. Whenever the ratification of a treaty cannot be secured of the Senate, the

<sup>1</sup> See these very interesting discussions in "Congressional Record," Fifty-ninth Congress, 1st Session, pp. 1571, 2344.

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President will still be free, in many cases, to follow out the same policy through employing his purely Executive powers, such as the command of the Navy, the direction of the Diplomatic Corps, etc. As long as the President, therefore, has a majority of the Senate on his side, he need not fear to pursue a very vigorous foreign policy; and he will be able to carry out most of his plans without any reference to the treaty-making majority of two-thirds in the Senate. He may not be able to secure general arbitration treaties, but precedent allows him by agreement to submit individual cases to arbitration. He may not be able to get a treaty like that with San Domingo ratified, but he may still carry out a large part of the policy embodied in it. Reciprocity arrangements, which involve the exercise of the taxing power, could not of course be easily effected without the use of the full treaty-making power, and even to the latter the House has always objected as an interference with its right to initiate revenue legislation.<sup>1</sup> But in general, as will be seen, the President is by no means always powerless, if confronted by the lack of a two-thirds majority in the Senate. If the Senate, as a body, is obstinate, dilatory, and merely obstructionist in its dealing with foreign policies, the President will be supported by public opinion and by an influential sentiment within the Senate itself, if he makes the most of his prerogatives. The virtual acceptance by the Repub-

<sup>1</sup> In our tariff legislation, the President has been given a limited power to make reciprocity arrangements. See Tariff Act of 1897, Sec. 3. General reciprocity treaties are to be "ratified by the Senate and approved by Congress." Sec. 4.

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lican majority of the President's policy in San Domingo, although the wisdom of that policy was honestly doubted by many senators, cannot fail to add great strength to the presidential position.

While the Senate cannot fairly be censured for protecting its rights, and carefully weighing the probable consequences of policies proposed by the President, it is indeed open to severe criticism for its tendency to inaction, for withholding its advice to which the President is entitled, and for not expressing, after a reasonable time, its consent or non-concurrence. Thus, it took the Senate two years to make up its mind regarding the appointment of Dr. Crum to the collectorship of the port of Charleston; the South American arbitration treaties were incubated for nearly three years; and the various reciprocity treaties have never been promptly acted upon. Senator Cullom declared before the Reciprocity Convention in Chicago last summer, that he could not safely get the reciprocity conventions up in the Senate, saying that to defeat them might offend some other nation. The Senate has, however, not generally shown itself very delicate of the susceptibilities of other nations, and the reason for the continued suppression of these treaties probably lies in another direction. It is to be feared that often individual senators lack the political courage to go on record on such a measure. It is also a sign of the deplorable tendency on the part of Congress in respect to our tariff policy, not to judge any individual proposal upon its own merits, but simply to oppose it on general principles, as likely to afford a precedent for further action

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modifying the tariff, and thus interfering with the cherished rights of protected interests.

This merely negative policy of control does not serve to increase the prestige of the Senate. It indicates a certain weakness, a lack of grasp and statesmanship, a shrinking from responsibility, when the Senate finds itself unable to come to a decision on such vital questions of the day. At the very time when it is claiming a more active and prominent share in the management of our foreign affairs, the Senate often exhibits extreme dilatoriness in actual performance. Its experience and training make its criticism on matters of detail exceedingly valuable; but frequently it sticks in detail, apparently unable or unwilling to judge a question upon a broad basis of statesmanship. If we are to have an efficient, consistent, and dignified foreign policy, a large discretion ought, indeed, to be allowed the President and the Department of State. They must be able to seize and utilize opportunities of the day that may not recur. Taking advantage of the psychological moment in negotiations, they must be able to count upon not having their arrangements overthrown by an overcritical and jealous Senate. The President on the other hand, whatever diplomatic work he may undertake, should have before his eyes the necessity of defending his course of action before a body of experienced and far-seeing men, men not anxious to insist upon prerogative in detail, not jealously watching every step of the Executive, but nevertheless judging carefully and critically of the general scope of his policy. Such

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relations would be far more beneficial to our national standing and welfare, than the carrying on of foreign affairs through "policies" and agreements of the Executive, under careful avoidance of senatorial co-operation, and with the concurrent attempt of the Senate as a body to vindicate its prerogatives by blocking the plans of the Executive whenever possible. While the latter is not an exact picture of the present relations between Senate and President, it still indicates what may be the result if certain recurrent tendencies are persisted in.

The recent modifications in the procedure of the House of Representatives have resulted in a decided increase of the influence of the Senate. On account of the strict rules of the House, cutting off debate and even the right of amendment, full discussion of a measure is rarely ever had in the House, and there has resulted an unmistakable loss of the sense of responsibility among its members. The prevailing tendency is to pass important measures without due consideration, and often in a full consciousness of their defective nature, in the expectation that the Senate will straighten out and complete the attempted legislation, or lay it at rest in the quiet of its committee-rooms. The laudable attempts of the speaker and the committee chairmen of the House to hold to a régime of strict economy, has given the Senate a further opportunity to exercise its influence. Amendments to appropriation bills that would have no chance of passage in the House or which have been ruled out on a point of order, will often be offered in the Senate, through the friendly offices of

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some member of that body, who, through such favors, makes individual representatives dependent upon his good will. Senate debates also attract far more attention than the meagre discussions which take place in the House, because important political issues are still hammered out in the smaller body. Though the speeches may at times be too discursive and long drawn out, and show a falling away from the old-time reserve and dignity of the Senate, there is enough of ability and experience left in the chamber frequently to give its discussions a real importance and an undoubted significance. The issues of recent presidential campaigns have generally received their most complete and adequate treatment in the Senate.

A controversy of long standing between the two houses is connected with the introduction of bills raising revenue, which by the Constitution is left entirely to the House of Representatives. The attempted exercise of this power by the Senate, in a more or less direct way, has always encountered strong opposition. In 1831, Benton's proposal for the abolition of the duty on alum was defeated in the Senate itself on account of constitutional objections. In 1833, Clay argued that his compromise tariff might originate in the Senate as its purpose was not to raise revenue but to reduce it. Webster opposed this construction, and after full debate the Senate bill was laid on the table; it was subsequently introduced in the House as a bill of that body. In 1837, a Senate bill authorizing the issue of treasury notes caused much discussion in the House. Robertson of Virginia spoke with bitterness of the long continued dictation

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of the Senate, and John Quincy Adams said that for five years past, not one of the many revenue bills had originated in the House. The chairman of the Committee on Ways and Means, Camberling, favored the bill, arguing that it was a mere anticipation of revenue. But, to satisfy constitutional scruples, the Senate bill was dropped, and a House bill of similar tenor was taken up in its stead. Senator Evans, in 1844, reported a resolution that the bill to revise the compromise tariff should be postponed as it could not originate in the Senate. The resolution was passed after a long debate. During the Civil War, a Senate bill providing for a five per cent. income tax was strenuously opposed in the House by Thaddeus Stevens, with the result that the Senate receded from its position.

After the Civil War, the Senate showed less readiness to heed constitutional objections to its action on money bills, and it began to use its power of amendment in such a radical and sweeping fashion as to render at times entirely nugatory the right of introduction on the part of the House. A striking instance of this occurred in the passage of the tariff act of 1872. The House had passed a bill to repeal certain duties on tea and coffee. To this measure the Senate added by way of amendment a general revision of the tariff. So strong had the influence of the Senate grown by this time, that, notwithstanding the strong opposition of Garfield and other House leaders to what they considered high-handed usurpation, the Senate prevailed in its contention. In 1878, the Senate bill for the reduction of rates of postage was refused

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concurrence. One of the chief objectors at that time was Mr. Cannon, who thus early began his career as champion of the rights of the House. A new and sweeping assertion of senatorial power came in 1883. A revenue tariff had been quite generally demanded by public opinion, and a commission of three appointed by the House had reported in favor of such a policy. But the protected interests were so influential in urging their point of view that the House did not effect any tariff legislation, but contented itself with a bill reducing the internal revenue. The Senate, however, considering inaction on the customs duties dangerous at that time, appended a complete tariff law to the House bill. The Democrats in the House shouted "prerogative" with much force, but the Republican members took their cue from the Senate and allowed the bill to be thrown into conference where it was accepted. Thus did it come about that the tariff of 1883, was neither originated in the House, nor even discussed in that body in regard to its provisions.<sup>1</sup> In 1901, a House bill to repeal stamp taxes imposed during the Spanish war was sent to the Senate. The latter amended the bill by striking out everything after the enacting clause, and substituting a new measure reducing the taxes on beer and tobacco. This instance, beyond being the most extreme example of the use of the power to

<sup>1</sup> In 1883, the Senate amended the Mills tariff bill by striking out everything after the enacting clause and substituting an entirely different measure. As the two houses at this time represented different political parties, their respective bills served as party platforms on the tariff question.

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amend, is also a striking indication of the political tendencies in the Senate; for whereas the House desired to remove the imposts that weighed upon the people in general and were an embarrassment to business, the Senate was satisfied with reducing taxes the incidence of which was mainly upon a few powerful interests. These successive attempts to place the origination of money bills in the hands of the Senate, ultimately aroused a strong feeling of opposition on the part of the House, and it became a determination in that body not to countenance any further encroachments along this line. When, therefore, in 1905 the Senate added to the agricultural appropriation bill an amendment relating to a drawback of the duty on wheat, which would have affected the Dingley act, the House, by a vote of 263 to 5, passed a resolution returning the bill to the Senate, on the ground that the amendment contravened the requirements of the Constitution. It has been repeatedly held by speakers of the House, latterly by Carlisle and Reed, that in order to come within this constitutional provision, bills need not definitely propose the raising or the lowering of revenue, but that if they in any way affect the revenue or its administration, they come within the prohibition of original action by the Senate.

By insisting on its prerogative to have the sole power of introducing revenue bills, the House cannot, however, succeed in materially reducing the actual power of the Senate over that kind of legislation. The three most important revenue acts passed in recent years were all subjected to radical modification

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by the Upper Chamber. It is well known how the Wilson bill, passed by the House in the execution of an explicit promise given to the electorate, was utterly transformed by the Senate. The circumstances under which this distinct breach of party pledges was perpetrated by a number of Democratic senators, did much to undermine the credit of the Senate among the American people. Assured of its tactical position, the Senate would not listen to compromise, but adhered to its amendments without the alteration of a line. In the case of the Dingley bill, the House played directly into the hands of the Senate. As we have seen, the measure was forced through the House, practically without debate; whereupon the Senate, apparently contrary to the expectations of the House, took ample time for the thorough discussion and the unstinted amendment of the bill. Eight hundred and seventy-two amendments were added, to almost all of which the House agreed in conference.

In the matter of appropriations, the Senate is not, as it formerly was, and as the Constitution intends it to be, a check on the House, but habitually increases the appropriations made by the latter. The speaker's economy drives members of the House to seek the assistance of senators; and as the individual senators can acquire power by showing liberality in this matter, there are among them few sticklers for retrenchment. But while the Senate attempts to add large sums to appropriation bills, it has on the whole been fairly reasonable in its action in the conference committees, as is shown by the annexed figures, which give the original amount of the sundry civil appro-

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priation bill as it passed the House, the amount added by the Senate amendments, and the ultimate increase as decided upon in conference.<sup>1</sup>

### SUNDRY CIVIL APPROPRIATION BILL

Year	Amount of House Bill	Increase proposed by Senate Amendments	Ultimate Increase decided on in Conference	Amount of Act
1903	\$79,849,949	\$6,625,381	\$2,423,006	\$82,272,955
1904	56,241,210	2,658,000	1,599,000	57,840,210
1905	65,292,080	2,447,270	1,771,670	67,063,750
1912	109,567,974	6,754,830	2,471,210	112,039,184

These figures show that the increase attempted by senators is very materially reduced by the Conference Committee. Occasionally the House has instructed its conferees not to accept specific Senate amendments.

The principal characteristic—though a negative one—of the procedure of the Senate, is the total absence of all rules in any way limiting discussion. The use of the previous question was abolished early in the history of the Senate, and Clay's attempt to re-introduce it in 1840 did not succeed. Since then the Senate has come to look upon the complete freedom of discussion as its most cherished attribute, as indeed it does guarantee the dignity and importance of each individual member.<sup>2</sup>

<sup>1</sup> "Congressional Record," Conference Committee reports for the respective years.

<sup>2</sup> The rules originated by Mr. Hoar also protect the dignity of members. No senator in debate shall impute to any senator any "conduct or motive unbecoming a senator," nor refer offensively to any state of the Union.

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The unlimited liberty and opportunity of speech has however been repeatedly abused in the recent past, and turned to purposes not in harmony with the idea of rational deliberation. The silver senators were the first to make unduly extensive use of this freedom of debate to tire out the opposition to their measures. Senator Carter's well-known performance, when, at the end of the session of 1901, by means of a harangue of thirteen hours, he defeated the river and harbor bill, did not subject him to severe censure, because that bill was not generally regarded as a wise measure. But his action, considering his motive—to punish the Senate for not having given him a coveted appropriation for irrigation purposes—would certainly not bear repeating very often without seriously discrediting the Senate. The latter was in fact the result, when Senator Quay, himself and by proxy, with interminable talk tried to shut out other measures and filibustered for his statehood bill. Nor did Senator Morgan's probable conscientiousness in his objections to the Panama Canal free from censure his use of a like method. When Senator Platt of Connecticut poured forth everlasting discourses on Cuban reciprocity, it was with the incidental purpose of side-tracking tariff revision. Earnest, explicit, and thorough discussion of a measure has become a favorite method of the Senate for the postponement and defeat of other measures, an open attack upon which would be considered impolitic. What Senator Carter did in 1901, the representative of South Carolina threatened to do two years later, in his successful attempt to force upon

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the Senate a claim of his state for \$47,000, which, after deduction of a valid federal set-off as adjudicated by the proper authorities, actually amounted to 34 cents. This extreme instance of what Senator Vest called blackmailing the Senate, seems to have been the straw that broke the camel's back. It aroused a deep sense of indignation on the part of the House, leading to the firm resolve not to submit to such tactics on the part of the Senate in the future.

At the end of the session, after legislative measures have been subjected to extensive discussion in the Senate, and when little or no time remains for action in the House, the conference committees meet to discuss the points of difference between the two houses. At this time the representatives of the Senate are apt to use the inability of that body to close discussion as a cudgel to be held over the House of Representatives, in order to force it to accept the point of view of the Senate. Their arguments upon such occasions take the following form, "This is the best we can secure. Should we introduce an enactment complying with the wishes of the House, it would inevitably be talked to death by certain senators who are opposed to this measure. Therefore, if any action is to be had at all we must adopt the compromise proposed by the Senate." The repeated use of this argument finally drove the leaders of the House to remonstrance; after the incident of the claim mentioned above they made a declaration of independence. Under the rules of the House, general appropriation bills are not allowed to include changes of existing law. But the Senate has no such rule, and, in the

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words of Mr. Hull, "there is hardly a conference report adopted by the House that does not contain legislation which could not have been brought in under the rules."<sup>1</sup> When in February, 1903, the Senate added to the army appropriation bill an amendment of the law concerning the retirement of officers, it was pointed out that these provisions would have no standing under the House rules and Mr. Cannon declared, "In this body close to the people, we proceed under the rules. In another body . . . legislation is by unanimous consent."<sup>2</sup> But indignation rose to its full height, when the South Carolina claim had been forced down the unwilling throats of the powerless conference committeemen of the House. On this occasion Mr. Cannon made the following statement of remonstrance:

"Gentlemen know that under the practice of the House and under the rules of the Senate the great money bills can contain nothing but appropriations in pursuance of existing law, unless by consent of both bodies. If any one of these bills contains legislation, it must be by the unanimous consent of the two bodies; and the uniform practice has been, so far as I know, the invariable practice has been, with the exception of one amendment upon this bill, that when one body objected to legislation proposed by the

<sup>1</sup>The House itself, as we have seen, is not always strict in its adherence to the above rule; but at any rate the introduction of new legislation in the general appropriation bills is confined generally to provisions in extension of services already sanctioned by law, while entirely extraneous legislation, not germane to the specific subject matter of the appropriation bill, would not be permitted.

<sup>2</sup>"*Congressional Record*," Vol. 36, Part 3, p. 2347.

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other upon an appropriation bill, the body proposing the legislation has receded. . . .

"The House conferees objected, and the whole delay has been over that one item. In the House of Representatives, without criticizing either side or any individual member, we have rules, sometimes invoked by our Democratic friends and sometimes by ourselves—each responsible to the people after all said and done—by which a majority, right or wrong, mistaken or otherwise, can legislate.

"In another body there are no such rules. In another body legislation is had by unanimous consent. In another body an individual member of that body can rise in his place and talk for one hour, two hours, ten hours, twelve hours. . . .

" . . . Your conferees were unable to get the Senate to recede upon this gift from the treasury against the law, to the state of South Carolina. By unanimous consent another body legislates, and in the expiring hours of the session we are powerless without that unanimous consent. . . .

"Gentlemen, I have made my protest. I do it in sorrow and in humiliation, but there it is; and in my opinion another body under these methods must change its methods of procedure, or our body, backed up by the people, will compel that change, else this body, close to the people, shall become a mere tender, a mere bender of the pregnant hinges of the knee, to submit to what any one member of another body may demand of this body as a price for legislation."<sup>1</sup>

It can admit of little doubt that in its opposition

<sup>1</sup> "Congressional Record," Vol. 36, Part 3, pp. 3058-9, March 3, 1903.

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to the use of the *liberum veto* by individual senators, the House will enjoy the full sympathy and the hearty support of the American people. Nor can the members of the Senate themselves desire that such a practice should become customary, for, though it would upon occasion give individual senators great power, it would soon completely undermine the credit and authority of the Senate. It is a distinctly feudal principle, by which the desire of one man, however prominent, may defeat the action of the State,—a principle similar to that which resulted in the political disasters and ultimate downfall of Poland. In the United States, great interests, struggling for feudal privileges, might be glad to entrench themselves behind the *liberum veto* of individual senators whom they control. But the more statesmanlike influences in this body oppose such a degradation; and they have not permitted the frequent abuse of this great discretionary power, which has been confined generally to the defeat of minor or local legislation. The danger however is present and calls for constant watchfulness on the part of the men whose aim it is to increase the true authority and dignity of the Senate.

While in the last few decades, many important measures have found their grave in the Senate, and the Senate has attracted attention by its obstructionist policy, it must not be forgotten that most of the important legislative enactments, not only in matters of revenue but of general policy as well, have come from the Senate, or have there received their characteristic form. We have already discussed the

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history of the recent revenue bills. The currency question was settled by the silver purchase repeal act; the legislative solution of the trust problem, as far as hitherto attempted, consists of the Sherman anti-trust and the Elkins anti-rebate laws; the governmental policy of our dependencies and our relations to Cuba were determined by the respective Senate amendments to the army appropriation bill of 1901, to which the House gave only one hour of discussion. The Senate also defeated the Force Bill, a greater title to credit than most of its negative action, including the defeat of the Panama legislation in 1905 under the leadership of Senator Gorman. The railway rate bill of 1906 is an exception, being a House measure. But its discussion in the Senate was careful and thorough, and it received some important amendments, including the provision for a broad judicial review.

The manner in which the experience and the legal ability of the Senate are used in a detailed criticism of proposed measures, is shown by the treatment of the Philippine railway bill in December, 1904. The bill, as originally prepared by the Insular government and introduced and passed in the House of Representatives, provided for the high interest guarantee of five per cent. on the capital invested in construction, and did not make the treasury advances an effective lien upon the property of the railway companies. By the Senate amendments, the interest was reduced to four per cent., and the rights of the government were effectively protected by an adequate lien with indefeasible priority over other claims. Examples of such useful amendments of the details of legisla-

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tion might be multiplied. They show how carefully the Senate scrutinizes proposed measures and how much legislative expertness it contains. In order to play a determining part in the Senate a man needs more than purely ornamental attainments; in fact, the men who gain prominence in that body must be inured to the hardest kind of work. There are of course some drones, rich men who look on the Senatorship as an opportunity for personal display like a box at the opera, and who care little for the real business of the Senate. But they fortunately do not as yet form a numerous class. Senator Hoar, speaking of the labor imposed upon members of the Senate, estimated that the Committee on Claims alone required of him more individual work than is performed in a year by any judge of a state court, and that the amounts dealt with were greater than those involved in the annual litigation before any state Supreme Court. The state judges might dissent from this estimate, or from the first part of it, but at any rate it indicates the impression which the drudgery of committee work made upon Mr. Hoar.

A study of the Senate would be incomplete were it to give no attention to those relations which lie outside of the legislative and executive functions of the Senate. Through the connection of individual senators with the party machinery in states and nation, and also with powerful economic interests, the political influence of the body itself is greatly enhanced. The advantageous position of the senators with respect to the control of party machinery was recognized as soon as the Senate had made good its powers over the fed-

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eral patronage. Professional politicians, whose chief stock in trade is the procuring of public office, soon developed a vivid interest in the senatorial position. Before long, men who were supremely successful in the organizing of the political forces of the State, claimed for themselves the high honor and the potent influence of the senatorship; and they often gave the position of junior senator to a personal ally whose chief political qualification consisted of liberal campaign contributions. The direct control which the party machinery exercises over the state legislatures, and over the workings of the caucus system, makes it essential to the senator, if he be not himself the boss, at least to court the good graces of the party magnates. He must be a master of practical politics. Indeed, most senators, often against their personal likings, find that the major portion of their time is taken up with the nursing of political support at home. This development has introduced into the Senate a class of prominent politicians, who are often lacking in those qualities of statesmanship which the traditions of the Senate demand, who are simply shrewd players of the intricate game of local politics, and who have introduced commercial ethics into political life. Nevertheless it is apparent that the power of the Senate as a body has been enhanced by this direct connection with, and control of, the party organization. The dominating influence of the Senate in this matter was never more clearly shown than in the Republican convention of 1900. Both the temporary and the permanent chairmen were senators; the four nomination speeches were made by senators; and

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there were seven senators on the most important committee, that on Resolutions, which drafted the national platform. The National Committee appointed by the convention contained five senators, among them Hanna (as chairman) and Quay. The advisory council appointed by the National Committee, had three senatorial members, among them Platt and Depew; while Hanna, Quay, and Scott were members of the Executive Committee. So well organized was the senatorial group at this time, that the selection of the Presidential candidate was largely determined by their discretion, both in 1896 and in 1900. In consequence, the influence of the Senate over the Executive was greatly enhanced during this period. The Senate did not take quite so prominent a part at the convention of 1904. Mr. Cannon acted as permanent chairman; but Senator Lodge headed the Committee on Resolutions, and the Republican National Committee of the year contained six senators. Through their control of the party machinery, senators have gained a decided ascendancy over members of the House of Representatives. In some cases the latter owe their political life and prominence almost entirely to the sufferance of the senator. This was notably true of the Pennsylvania delegation in Congress during the Quay régime. But even where the congressman has independent political strength, it is advisable for him to remain on a good footing with the Senators, as the heads of the party machinery in his state; and especially should he be ambitious to enter the more select chamber, the attitude toward him of the senior senator will often be of determining influence.

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Besides gaining power through the connection of its members with the party organization, the Senate has further increased its influence through the fact that senators are in many cases in close touch with powerful economic interests. In the earlier Senates, the profession of law constituted in every respect the dominant element. Men of broad interests and sympathy, who frequently had won their fame through high professional attainments or through brilliant gifts of oratory—the lawyer-statesmen—were an *élite* of sufficient distinction to establish the reputation of the Senate on a solid base. But at present, the profession of law itself is no longer so broadly representative, so universally trained, and so constantly in touch with the masses of the people, as in the days of men like Clay, Webster, and Carpenter, who had a general practice such as is now carried on only by the lawyers of small county towns. The lawyers of the Senate of our day are of a different type, as a rule. They are either keen men of business who have early abandoned the practice of law to devote themselves to industrial promotion, or they are specialists who have won prominence as counsel for great corporate interests. The point of view of these men is utterly different from that of the mid-century lawyers. Their technical and business training is indeed of the greatest value in the work of legislation. They have a keen eye to distinguish the feasible from the merely desirable. Their detailed criticism of bills and of treaty drafts is informed with a long experience in practical business matters. There are among them still a few men who can make an ad-

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mirable constitutional argument, though their number is decreasing.

It is, however, natural that the senators should look upon political matters from the vantage ground of their special experience and of the interests with which they have been connected. There need be in this no suspicion of direct corruption; there may, in fact, often exist a conviction of absolute impartiality. Yet their attitude of mind and of temper is nevertheless characterized by that conservatism—often exaggerated—of the man to whom is intrusted the management of great economic interests. In some instances, unfortunately, the representation of interests has gone beyond a mere natural bias or attitude of mind. There are senators whose controlling purpose seems to be to protect and advance the interests of particular combinations of capital, without any regard to the broader principles of statesmanship, or even to their plain duty as representatives of the commonwealth. The Senate was given its varied and extensive powers under the Constitution as representing the semi-independent commonwealths which joined together to form the Union. Now that the national idea has superseded the old view of states' rights, it is to be feared that these powers may be exercised not indeed under instruction from the state legislatures, but upon dictation from great economic interests, in which the local and the national character is often combined, but whose aims are nevertheless much narrower than those of a commonwealth ought to be. It admits of no doubt that though the Senate has gained in influence through its connection with these interests,

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it would inevitably court the ultimate loss of its power were the individual senators generally to degrade themselves from being the tribunes of a commonwealth to a mere attorneyship-in-fact for certain powerful corporate interests.

Much hope has recently been expressed that the establishment of popular election of senators may cause an improvement in the personnel of the Senate through breaking down the influence which party organization and corporate interests exerted over the choice of legislatures. Indeed, in the primary election laws a method had been found whereby, without an amendment of the Constitution, senators could virtually be elected by popular vote, and the legislatures reduced to the mere registering function of the Federal Electoral College. Some of the senators who were elected in the states where this system had been introduced, published with pride the popular majority by which they had been "elected." As to the effect of the change, thus far all reasoning can merely be guesswork. Whether it will result in developing a broader and more statesmanlike leadership, only the future can show. It would, however, seem that it will hereafter be easier to arouse a strong and effective public sentiment against a man who has proved himself specially unworthy of the senatorial office, or in favor of a leader who has the qualities of mind and character which are apt to win the confidence and admiration of the people. Whether such leaders will always be safe and trustworthy is a question connected with the general problem of democracy.

## CHAPTER IV

### THE STATE LEGISLATURES

THAT the importance of state legislatures in our political system is not generally realized by the American people, is apparent from the scanty attention given to the business and procedure of these bodies and from the manner in which Americans affect to hold in slight esteem everything connected with them. And yet it admits of no doubt that for the proper functioning of our complex National Government, it is very necessary that the state legislatures should be efficient and respected. We have so thoroughly turned our backs upon the theory and practice of states' rights that we are in danger of going to the other extreme, and of seeking political salvation in a constant expansion of the sphere of the central government. When centralization and combination are the watchwords of the era in economic life, it is natural to conclude that all social and political functions and activities should be similarly centralized. And yet when we contemplate the results brought about by economic centralization, we are somewhat appalled by the power and the cruel and inconsiderate action of the machinery thus created, and there awakens a desire that we might avoid a condition in

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which the entire national life would be controlled by a small group of men. All indiscriminate decrying of state governments, and especially of state legislatures, is unfortunate and dangerous; because instead of arousing in the citizens the purpose of strengthening and purifying the local institutions of government, and thus allowing that condition of national life to continue in which political experience is varied and deepened by local differences, such course of action induces men to look upon the organs of state government as hopelessly inadequate, and to center their attention and their purposes entirely in the Federal Government. Even though centralization has gone far, the field occupied by the state legislatures is still exceedingly important, and the very fact that legislative experiments are rendered possible by this system and that problems like economic control can be worked out in smaller areas before being attempted on a national scale, renders the continued strength of local institutions highly desirable. The legislation of the states is actually of far greater importance to the citizen than that originated in Congress. The general law under which we live is entirely under the control of the state legislatures. Such momentous matters as the relations between labor and its employers, the law of the family and of property in all its ramifications, the law of personal injuries and of crimes, are all within the state legislative field. Moreover, the last decade has brought a remarkable development in the administrative functions of our commonwealths, far beyond anything that could have been foreseen during the earlier era of our history.

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Yet unhappily it is true that state legislatures have attracted public attention and caused public discussion not so much on account of the importance of their functions, or the greatness of the interests with which they deal, as on account of the bottomless corruption which has disgraced so many of them. Their evil fame has almost outweighed in the public mind the general usefulness of these institutions throughout the country. It is indeed time that a different attitude should be assumed toward these bodies, that more intelligent and discriminating attention should be given to the efforts of their members. It has become almost fashionable to talk of state legislatures as bodies in which men of ability and respectable character are in a disappearing minority, and yet even the most superficial acquaintance with actual legislatures will immediately reveal the fact that they are very fairly representative of the American people, and that there is in them a great deal of honest effort to grapple with the difficult problems of legislation, misguided though this effort may be at times for lack of authentic information, and thwarted by certain vicious arrangements in our political system. The state legislatures by no means deserve to be treated as unimportant or cast aside as vitiated beyond hope. Such superficial views must give way to an intelligent study of the workings of these institutions, to a sane and impartial criticism; and before all, there ought to be a sustained effort to support the men who are with honest purpose struggling for equitable and effective legislation, by giving them countenance and by raising their achieve-

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ments to that plane of public importance which they deserve.

The state legislatures differ from Congress in that they do not exercise specifically delegated powers but have a general, residual legislative authority. In the state constitutions their powers are not enumerated as are those of Congress in the Federal Constitution, legislative power being conferred upon them in the most general terms. The essential character of their authority is more like that of the English Parliament, but on account of the division of powers they are beset with limitations from which that body is free. Originally, in our state constitutions, very broad powers were accorded the legislatures, powers not even limited by an executive veto.<sup>1</sup> But with the growing mistrust of legislatures and the disappointment with the results achieved by them, a strong tendency has arisen to impose upon them limitations which cut down their power and place their procedure under the control of public law.<sup>2</sup> The ways in which this has been accomplished may be roughly summarized in the following manner:

First, it has been attempted to diminish the amount of legislative action, by limiting the duration of sessions and making them less frequent.

Second, by defining and regulating the main steps

<sup>1</sup> Except in Massachusetts and New York. Madison spoke of the legislatures as omnipotent.

<sup>2</sup> The discussions in the Pennsylvania Constitutional Convention of 1873, and in the New York convention of 1894, are especially full and interesting on the subject of legislative limitations.

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in procedure, safeguards have been provided against hasty, ill-considered, and one-sided legislation.

Third, the making of special and local laws has been quite generally prohibited where a general law can be made to apply.

Fourth, the veto power of governors has been created and its use encouraged.

Fifth, certain express limitations have been imposed upon the legislative power with respect to the subject matter of laws, and large fields of legislation have been occupied by constitutional revisions and amendments.

Sixth, all these things have led to far greater interference with legislative enactments on the part of the courts, which during the earlier decades of our national life were exceedingly anxious to avoid any appearance of control over legislative activities.

The above express limitations we desire to take up and discuss in this chapter. But the inherent limitations of legislative power under our system, as well as those expressly imposed under the Federal Constitution, have already been so fully discussed and expounded, that we shall refer to them only incidentally.<sup>1</sup> The express limitations upon legislative power with regard to the subject matter of laws, will also not be further discussed in the present volume, which deals primarily with legislative methods and organization.

It is natural under our system that the general organization of the legislature should be determined

<sup>1</sup> The student is referred especially to Cooley, "Constitutional Limitations."

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in its main outlines by the constitution. Thus it is provided in all the states that there shall be two houses, a Senate and a House of Representatives.<sup>1</sup> Their membership is based indeed upon the same electorate, but the Senate districts are larger and the qualifications for election to that body are usually somewhat stricter.<sup>2</sup> The membership in the Senate is ordinarily<sup>3</sup> so arranged that this body like the United States Senate has a permanent organization, only a certain portion of its members being chosen at any one election. A number of constitutions fix the compensation to be paid to members of the legislature, and where this is not done, it is quite usual to forbid an increase of their emoluments during the term of office. Where the compensation takes the form of a *per diem* allowance, it is customary to limit the duration of the session, or at any rate the number of days for which compensation may be drawn.<sup>4</sup> This limita-

<sup>1</sup> In some states the designation is "Assembly," in others "House of Delegates."

<sup>2</sup> See Chap. VII for a discussion of the basis of representation and qualifications. <sup>3</sup> In twenty-four states.

<sup>4</sup> The session may not exceed ninety days in Colorado, Maryland, and Minnesota; seventy-five days with pay to the legislators in Tennessee, seventy days with full pay in Missouri, sixty days with pay in Texas; sixty days in Arkansas, unless extended by a two-thirds vote of each house; sixty days absolutely in Delaware, Florida, Indiana, Kentucky, Louisiana, Montana, North Carolina, North Dakota, Rhode Island, South Dakota, Utah, Virginia, and West Virginia; fifty days in Alabama, Georgia, Kansas and Nevada and forty days in South Carolina and Wyoming. It is obvious that most of these periods are too short for a careful consideration of the needed legislation. Several of the states still preserve the old prac-

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tion of sessions is due also to the desire to oblige the legislators to get through their business with due dispatch and to save the state from the evils of over-legislation. This motive has led to a quite general movement toward making the sessions less frequent. Whereas formerly annual sessions were the common practice, at present only six states (Georgia, Massachusetts, New Jersey, Rhode Island, New York, and South Carolina) allow their legislatures to meet every year. The ordinary system is to have biennial sessions, but in two Southern states the aversion to legislative meddling has led to the extreme measure of making the sessions quadrennial.<sup>1</sup> The principal argument of those who favor such restriction of legislative activity is that with less frequent legislative sessions, the more important matters will occupy the attention of the legislators, and individual members will recognize the futility of advancing pet schemes of a merely personal or local interest. But even granting that the quality of legislation could not be improved by this means, at any rate, it is argued,

tice of allowing a session unlimited in length and these are usually the states which pay members of the Legislature an annual salary. In Massachusetts, the governor may prorogue or adjourn the Legislature at any time, for not over ninety days, and in New Hampshire, he may adjourn it after three months of the session have passed. Extra sessions are usually called by the governor, as he sees need, and are frequently limited in length by the state constitutions to twenty, thirty, or forty days.

<sup>1</sup> Mississippi and Alabama. The Legislature meets, however, in the interval in extra sessions, the action and duration of which are strictly limited.

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we shall have less of that poor quality to which we have been accustomed. It is hoped that, meeting more rarely, the legislature will attract greater public attention, and thus become a desirable field of activity for men of ability. The work to come before it may be to a certain extent prepared by administrative officers, so that the legislature can immediately enter upon the discussion of specific measures. On the other hand, it is urged in opposition to this view that the attempt to shorten sessions and render them less frequent will necessarily lead to even more hasty legislation than we have had in the past. During the short time available, so many interests will be pressing for a hearing that the legislators will become helplessly confused and will in the end vote on most measures without due investigation. Moreover the continuity of experience which is gained by more frequent sessions, will be lost where the intermission is too long. It may indeed be impossible materially to affect the quality of the legislative product by mere changes in the length and frequency of sessions; and it is certainly conceivable that the annual General Court of Massachusetts may legislate more carefully than would be possible in the rush of a quadrennial session. In general, however, the biennial session commends itself to the judgment of the American people.<sup>1</sup>

<sup>1</sup> When in 1895-6 the question of biennial sessions was discussed in Massachusetts, it caused the greatest political controversy of recent decades in that commonwealth. Although the business interests were strongly in favor of biennial sessions, the old democratic town meeting spirit of Massachusetts asserted itself and maintained the annual session.

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The distrust of legislatures is nowhere more strikingly apparent than in the detailed provisions in relation to procedure which many of the more recent constitutions contain. The purpose of such constitutional enactments in regulating and defining the various steps of procedure is to avoid ill-considered and headlong action and the abuse of legislative power by narrow interests working in the dark. These provisions are not only interesting in themselves, as safeguards for proper legislative procedure, but they have given rise, one might say, to a new branch of jurisprudence in the attempt of the courts to arrive at logical rules for their enforcement. In this the courts have been but partially successful, and no clear and definite principles as to the application of these constitutional provisions have as yet been developed. Although the provisions themselves are apparently simple enough, their administration under control of the courts is nevertheless full of difficulties and contradictions.

Most of the constitutions provide that no law shall be passed except by bill, and they also generally prescribe the form of the enacting clause. In states where this requirement exists, the resolution, being less formal and lacking the enacting clause, cannot be used for the purpose of making laws. In general parliamentary law, the purpose of the resolution, which ranks below the bill in formal dignity, is to declare the legislative will in subsidiary and incidental matters, or to give formal expression to the opinion of the legislative body on some matter of policy.<sup>1</sup> In

<sup>1</sup> Mr. Willard in his "Legislative Handbook," summarizes

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political theory, the resolution, when used otherwise than as a mere expression of opinion, is really a legislative ordinance; in other words, an administrative provision proceeding directly from the legislature. Such administrative regulations may indeed be made by resolution even in states where no law can be passed except by bill, but in general the scientific character of the resolution is not carefully observed in its use by legislative bodies. In certain states (*e. g.* Massachusetts, Maine, South Carolina, as well as by the United States Constitution) joint resolutions are required to be submitted to the executive who has the right of veto, as in the case of bills, but their use for purposes of general legislation is infrequent.<sup>1</sup>

the various purposes for which the resolution may be used as follows:

- a. Incidental to legislation, affecting procedure, or the action of committees.
- b. Expressing approval or disapproval, condolence, thanks. Declaratory of policy.
- c. Urging special action on national representatives, or on executive officials.
- d. When used for legislation, it is generally for one of the following administrative purposes: (1) special directions to state officials, (2) small appropriations, (3) appointment of commissioners, (4) joint action with another state, (5) exhibitions and commemorative observances, (6) administration of the state's property, (7) small contracts, (8) fixing of compensation, (9) directions as to a vote on constitutional amendments.

<sup>1</sup> The matter of joint and concurrent resolutions was considered and reported on in 1897, by a Senate committee (Fifty-fourth Congress, 2d Sess., Senate Report, No. 1335). "The practice hitherto has been to deal with matters which are of importance merely to Congress and not to the President, which

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Another provision which is found in most constitutions is that no bill shall contain more than one subject, which shall be clearly expressed in the title.<sup>1</sup> The reason for this restriction is apparent. A clear and expressive title is required so as to give specific notice of the legislation attempted, both to the legislators and to the public.<sup>2</sup> But in a number of states, if the act relates to more subjects than are expressed in the title, as much as is so expressed will stand, either by express provision of the constitution or under the decisions of the courts.<sup>3</sup> In general, the courts have been very liberal in their construction of

are mere expressions of opinion, or regulations of congressional procedure, by *concurrent* resolutions, which, unlike joint resolutions, are not submitted to the President.

"Concurrent resolutions from their very nature require the concurrence of both houses to make them effectual, and if the Constitution in Section 7, . . . has reference solely to the form, and not to the substance of such resolutions, they must of course be presented to the President for his approval.

"For over a hundred years, however, they have never been presented. They have uniformly been regarded by all the departments of the government as matters peculiarly within the province of Congress alone. They have never embraced legislative provisions proper, and hence have never been deemed to require Executive approval."

<sup>1</sup> In most of these constitutions special exceptions are made in the case of appropriation bills and codifications.

<sup>2</sup> The provision with respect to the title was first used in the Georgia constitution of 1798. It is believed that it was inserted in consequence of the abuse of granting away large domains under the Yazoo act of January, 1795, which bore the title, "an act for the payment of the late state troops." (*Savannah v. State*, 4 Georgia, 38.)

<sup>3</sup> *Unity v. Burrage*, 103 U. S., 447.

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the requirement of an expressive title, and in a few commonwealths the courts have even held that the provision with respect to subject matter and title is merely directory, and does not render void laws passed in contravention of it.<sup>1</sup> A law is not voided by the fact that its title is general, as long as it fairly describes the purpose of the bill, and does not cover incongruous provisions. The phrase "and for other purposes therein mentioned," is, however, held too vague to be of any effect in validating parts of a statute which could not be comprehended under the more specific title of the act.<sup>2</sup> The requirement of unity of the subject matter is intended to prevent log-rolling legislation, as when various incongruous provisions representing the desires of special interests are united to be carried through under a general compromise; it also prevents the saddling of a bill with provisions, not germane to it, which are appended to a meritorious measure in order to hide their weakness or viciousness.<sup>3</sup>

The constitutions of a number of states<sup>4</sup> require that no bill shall be altered or amended so as to change its original purpose, a provision which would

<sup>1</sup> *Washington v. Page*, 4 Cal., 388. *State v. Covington*, 29 Ohio St., 102.

<sup>2</sup> Not so in Georgia, where this phrase is treated as sufficient notice to avoid surprise. *Martin v. Broach*, 6 Ga., 21.

<sup>3</sup> In New York and Wisconsin, the requirement of unity of subject matter applies only to private and local bills. In many other states it was first confined to this class of legislation, but has subsequently been extended.

<sup>4</sup> Arkansas, North Dakota, Pennsylvania, Colorado, Alabama, Wyoming, Montana, Missouri, Texas, Washington.

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prohibit the favorite practice of some legislative bodies of amending a bill by striking out everything after the enacting clause and substituting a different measure. The form of amendments is quite generally subjected to the specific limitation that no law shall be revised and amended by reference to its title only, but that so much thereof as is amended shall be re-enacted at length. It is of course not necessary that the original act should be set out in full, but the section as amended must be given. This provision is aimed at the practice of amending by merely citing the words to be changed and those to be substituted without giving their context. This custom led to serious abuses, because legislators lacked the time to look up every reference of this kind and to trace every amendment proposed. At present it is a common practice either to italicize the words and clauses which have been changed or to state first the specific words to be substituted and then to cite the entire section as amended.<sup>1</sup> While the constitutional provision regulates the manner of making specific and express amendments, it does not touch implied amendment through laws totally or partially inconsistent with previous enactments. Under the principle that the last expression of the legislative will prevails, the courts are of course bound to enforce the later in place of the earlier provisions. Much confusion and

<sup>1</sup> *E. g.* Section 3 of chapter 280 of the laws of 1905 is hereby amended by striking out the words "shall be," and inserting the words "may in his discretion be," so that the section as amended shall read, "The governor," etc. (giving the full text of the section as amended).

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uncertainty has thus been introduced into our legislation. But it would be difficult to prevent this by constitutional requirement alone.<sup>1</sup> Reliance must here necessarily be placed upon the good sense of the legislative body, and the expert information available to it.

In order to prevent the crowding of the last days of the session with legislative business, several states have adopted constitutional provisions prohibiting the introduction of bills after a certain part of the session has expired.<sup>2</sup> Restrictions of this kind have not, however, generally met the approval of constitutional conventions or of the public. It is felt that it is better to allow the legislature itself to set a time after which no bills shall be introduced, except under very special conditions. It is occasionally found that legislation of a certain kind is needed which was not thought of during the earlier part of the session. The principle of these provisions is, however, undoubtedly correct; and the enforcement of strict rules in this matter is highly desirable, as it prevents the crowding into the last days of the session of measures

<sup>1</sup> In Nebraska, though the constitution contains the provision that "no law shall be amended unless the new act contains the section or sections as amended," the Supreme Court has nevertheless held that "changes or modifications of existing statutes as an incidental result of adopting a new law covering the whole subject to which it relates, are not forbidden by this section." *De France v. Harmer*, 92 N. W., 159.

<sup>2</sup> E. g. Colorado, after thirty days; California, after fifty days; Maryland and Washington, in the last ten days; the last three days, Arkansas and Texas. A similar provision in Michigan has recently been repealed.

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which would be rushed through without proper consideration. Minnesota has a provision which does not allow a bill to be passed on the day of adjournment. This, however, simply has the effect of shortening the session by one day for legislative purposes; the last day is devoted to corrections of the journal, and to the passage of resolutions and memorials. In Indiana, there is a constitutional provision against allowing a bill of the legislature to be presented to the governor within two days of adjournment. In practice, however, bills are passed up to the last day, though only such as the governor is willing to consider; the provision therefore simply has the effect of giving him an absolute veto on all bills passed during the last two days of the session.

It is a very common constitutional provision that bills are required to be read by sections on three different days.<sup>1</sup> The constitutions generally provide that this reading at length may be dispensed with by a vote of two-thirds, three-fourths, or four-fifths of the members present, but in some states the third reading at least must be at length, and in these not even unanimous consent can substitute a reading by title only.

The recent tendency in constitution making has been still further to surround parliamentary procedure with various restrictions and safeguards. As an example we may cite the provision of the New York constitution of 1894, Article 3, Section 15:

"No bill shall be passed or become a law unless it

<sup>1</sup> Twenty-eight constitutions.

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shall have been printed and upon the desks of the members in its final form, at least three calendar legislative days prior to its final passage, unless the governor, or the acting governor, shall have certified to the necessity of its immediate passage, under his hand and the seal of the state; . . . upon the last reading of the bill no amendment thereof shall be allowed."

The constitution of Kentucky of 1891 regulates committee reports, and requires the printing of bills before passage, as well as the formal affixing to an enacted measure of the signature of the presiding officer of each house in open session. On this occasion, all business must be suspended, the bill is read at length, and the fact of its having been signed is noted in the journal. It is also provided that if a committee refuses to report on a measure, any member has the right to call it up for discussion and action. In Missouri, upon the occasion of the formal signing of the bill by the presiding officer, any member may enter a protest that the bill has not been passed in proper form. If supported by four other members, a record of this protest will be appended to the bill when it is sent to the governor for his signature. Provisions of this kind, intended to secure the careful consideration of bills and their proper authentication, occur in many among the newer constitutions.<sup>1</sup> It is an inter-

<sup>1</sup>In the New York Constitutional Convention of 1894, an amendment was proposed providing that "no bill shall be presented to the governor unless the presiding officer of each house shall have first certified that, in the passing thereof, the provisions of the constitution have been obeyed." This was

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esting fact that, whereas in England punctuation does not form part of an act and is not found in the original rolls, as the act is presumably passed as read *viva voce*; in the United States, where the bill passes not as read but as printed, the enactment has been held to include the punctuation. (*Tyrrell v. The Mayor*, 159 N. Y., 242.) The simplicity and directness of the English statutes is to a certain extent due to the fact that the wording must be rendered plain without the use of punctuation.

In order to prevent the passing of legislation by a minority of the House, the constitutions usually provide that in order finally to pass a bill, the majority of all the members elected must assent to it.<sup>1</sup> In the case of bills raising revenue, appropriating money, or incurring indebtedness, it is in many constitutions provided that the assent of more than a majority of the elected members is necessary. In many states, it is required that the yeas and nays upon the final vote shall be entered upon the journal. In others, they must be so entered on the request of any one of the members.

This brings us to one of the most complex and confusing points of legislative jurisprudence. The question has arisen whether the courts in applying the law of the state are bound to accept as final the enrolled bill, authenticated by the presiding officers of

objected to as virtually giving the veto power to the presiding officers, and it was urged that the observation of the constitutional procedure could be secured through the ordinary rules of the houses.

<sup>1</sup> In Kentucky, at least two-fifths of the elected members.

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the two houses and signed by the governor; or whether they may go behind the authentication and examine the journals to see whether all constitutional requirements have been fulfilled in the passing of the bill. On this question the courts are in contradiction and almost hopeless confusion. It was originally the prevailing opinion that the constitutional provisions were mandatory, and that the courts could go back of the formal authentication, and determine from the journals whether the constitutional provisions had been fulfilled. But this opinion has of late been losing ground, so that at present the courts are about evenly balanced for and against the conclusiveness of the enrolled bill, with a growing tendency toward the former alternative. The general principles involved and appealed to by the courts may be stated as follows. On the one hand it is claimed that if the specific requirements laid down by the constitution are not actually fulfilled, no valid legislation can originate; and a certificate of officials cannot render valid an act which is void, by falsely representing that it was passed with the due formalities. The courts, it is argued, are therefore bound to disregard such enactments when it clearly appears from the journal that definite constitutional requirements were not complied with.<sup>1</sup>

In behalf of the opposing alternative, it is urged that the Constitution directs its commands with re-

<sup>1</sup> County of San Mateo *v.* S. P. R. R. Co., 293. Spangler *v.* Jacoby, 14 Ill., 298. Simpson *v.* Union Stockyards Co., 110 Fed. R., 802. Opinion of Justices, 35 N. H., 579. State *ex rel.* *v.* Mason, 155 Mo., 486.

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spect to procedure to the legislature itself, and that the latter body must be trusted to carry out these provisions through its rules. The formal attestation of the presiding officers of the houses is considered on the whole better evidence of authenticity than the journal, which is kept by the clerk, an inferior official. The surveillance by one department of government over another is not considered wise, and it is believed to be a dangerous principle to hold that an act formally enrolled and authenticated, and received by the people as the sanctioned will of the state, could subsequently be overthrown by a reference to the journals.<sup>1</sup> It will readily be seen that, while the opinion that constitutional requirements must be actually enforced has great logical cogency, nevertheless the later opinion has in its favor many practical considerations. The practice of questioning a law which has stood on the statute books for years, because someone may discover in the journal that a constitutional requirement was omitted in its passage, would lead to a general unsettling of confidence in the legal system. The public interest may seem sufficiently protected through the mutual watchfulness of members of the legislature, who will insist upon the fulfilment of constitutional requirements in the case of measures which they oppose.<sup>2</sup> We may also generally rely upon the formal authentication

<sup>1</sup> See *Field v. Clark*, 143 U. S., 649. *Lafferty v. Huffman*, 99 Ky., 80. *Purdy v. Commissioners*, 54 N. Y., 276. *Sherman v. Story*, 30 Cal., 279.

<sup>2</sup> This is, however, by no means always the case. See Chapter VIII.

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by officials, especially when it is surrounded with safeguards similar to those provided in the Kentucky and Missouri constitutions. So the wiser course would seem to be to rely upon the enrolled bill, the formally authenticated measure, as implying that all constitutional requirements have been fulfilled.

The question of accepting the formal authentication of an act as final, is complicated in those states in which the constitution, beyond merely requiring that a journal shall be kept, provides further that the yeas and nays in final votes on a bill shall be entered upon the journal. The general requirement of a journal may be due simply to the purpose of having a public record of the actions of the legislature, and does not necessarily make the journal the sole and final proof of the passage of laws. But when any specific entry is directly required by the constitution, the case assumes a different aspect, and it may indeed be doubted whether a law can be considered valid, if such an entry has not been made. The Supreme Court of North Carolina has clearly stated the distinction, that, when the constitution contains no provision requiring specific entries in the journal, the enrolled act cannot be impeached by the latter; but upon the presence of such entries, where required, the journal alone is to be considered conclusive evidence.<sup>1</sup> According to this distinction, the enrolled bill will be conclusive proof that the ordinary requirements, such as three readings, commitment, a majority vote, etc., have been complied with;

<sup>1</sup> *Union Bank v. Commissioners of Oxford*, 119 N. C., 214. (1899.)

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and the journal should not be admitted to contradict these presumptions. But if it could be shown that the journal does not contain the record of a vote, which it is required by the constitution to contain, the act would have to be considered void, although formally authenticated. It may be urged that the protection which the commonwealth enjoys under such a constitutional provision would be jeopardized under a different interpretation. Thus a bill for a bond issue, requiring a two-thirds majority, might upon passing by a simple majority take the form of an authenticated act, in contravention to a specific constitutional provision. It may be noted here that some of the leading cases in favor of considering the enrolled bill final, have refrained from pronouncing upon this point, thus leaving it open for the above construction. The validity of the enrolled bill was perhaps strengthened most by the decision in *Field v. Clark* (143 U. S., 649), and yet in that very case the court says, in substance: "To what extent the validity of legislative action may be affected by the failure to enter upon the journal matters expressly required by the Constitution, we need not inquire, as this question is not presented." The court therefore merely decided that enrolled bills cannot be impeached for any omission in the ordinary constitutional procedure. In the famous case of the *United States v. Ballin* (144 U. S., 4), the court used the following language: "Assuming, though without deciding, that the facts which the Constitution requires to be placed on the journals may be appealed to on the question whether a law has been legally enacted, etc." The United

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States cases, therefore, hold that the journal is not necessarily the best or conclusive evidence upon the fact whether the bill was duly passed, but the courts have not decided that where the Constitution requires a specific entry in the journals, the courts may not go to the latter to ascertain whether the entry has actually been made. But the point thus insisted upon in the North Carolina decision, and left open by the United States Supreme Court, has not been so clearly distinguished by the courts of other commonwealths. In some of the states, whose constitutions require specific entries of votes, the courts have nevertheless held that the enrolled bill is in every respect final and conclusive; whereas in other states the broad rule is held that the courts may go to the journals to ascertain any omission whatever of constitutional requirements. It is this latter broad principle which is gradually being modified and partially abandoned. But the law on the matter is still in a state of great confusion, and even in individual commonwealths contradictory opinions have been held by the courts.<sup>1</sup>

One of the greatest abuses of American legislative life has been the excessive amount of special and local legislation. Not only is a just and scientific ordering of legal relations impossible under a system in which individual cases and states of fact are constantly dealt with, not on the basis of a general rule,

<sup>1</sup> In some of the states where the broad doctrine of reference to the journals is held, it is limited by the ruling that the failure to comply with the constitution must appear affirmatively from the journal, and that where the latter is silent, the enrolled bill cannot be impeached.

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but through exceptional legislation animated chiefly by a desire to gain special privileges and protect special interests. But this practice has also become the chief stronghold of corruption in our legislative bodies, and one of the principal means by which the political boss and his machine make their power felt by dealing out or withholding special privileges and advantages. Any attempt at reform of legislative procedure by means of constitutional provisions, therefore, very naturally embraces the matter of special and local legislation.

Legislative enactments are divided into general acts and special or local acts. A general act applies equally to all persons subject to the authority of the state, or to a whole class of persons, defined according to some essential characteristic, such as profession or age. Thus a law prescribing certain safeguards to be observed by physicians in surgical operations would be a general statute, because it deals with all persons who may undertake such operations, or if looked upon as applying to surgeons only, it applies to them as a class engaged in some particular profession. On the other hand, an act is local or special when it applies only to a specific locality, or to a group of persons, who do not really form a separate class as far as the subject matter of the special law in question is concerned. An act exempting all physicians from the payment of taxes would be considered a special act, because though they are distinguished from other citizens in matters of their profession, this distinction has no bearing upon the general duty of paying taxes. Thus, also, the imposition of a separate tax upon physicians

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would be a special law, but a license fee imposed under the police power on a certain business or profession on account of its inherent nature, although it may operate incidentally as a tax, will not be special legislation. Common examples of local or special laws would be acts incorporating a city or village, remitting fines or taxes to individuals, allowing an individual corporation an exemption from taxes, granting a divorce, etc.

A number of the state constitutions contain, in some form or other, the provision that whenever a general law can be made applicable, no special law shall be enacted.<sup>1</sup> The question here arises whether this injunction is directed merely to the conscience and discretion of the legislature, or whether it is the duty of the courts to declare void a special law, when they believe that a general law might have been passed covering the specific case involved. The prevailing opinion is that this matter must be left to the judgment and discretion of the legislature, on the general principle of the mutual respect due between coördinate departments.<sup>2</sup> But while this general principle has been announced, courts have in individual instances declared that where it is clearly apparent that a general law is actually in existence which

<sup>1</sup> Alabama, Arkansas, California, Florida, Kansas, Maryland, Missouri, Nebraska, Pennsylvania, Texas, West Virginia, Virginia, Wyoming, Illinois, Colorado, and others.

<sup>2</sup> *Owners, etc., v. People*, 113 Ill., 315. *Brown v. Denver*, 7 Colo., 311. In some states (*e. g.*, Missouri and Minnesota) the constitution provides that the question as to whether a general law could have been made applicable is to be judicially determined.

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would cover the case, a special act must be considered void.<sup>1</sup> In states where the courts have taken jurisdiction, the result has been to make the legislature rather careless of the constitutional provisions, leaving it to the courts to determine whether a given special act is valid. This determination can of course only be made if actual litigation arises, which is rather infrequent as often none but the beneficiaries of a special act know or care about its existence. So that in such states there is very much special legislation in force which, if attacked in the courts, might not be upheld.

Beyond this general provision, local and special legislation is in nearly all constitutions forbidden with respect to certain specific subjects. In some states the number of subjects upon which special legislation is prohibited runs up to as high as thirty.<sup>2</sup> There is a great variety of such subjects, but the following are most commonly found: divorce, court procedure, county and township affairs, incorporation, the rights and privileges of corporations, the remittance of fines and other dues, the management of real estate belonging to minors, the administration of highways. In states where these provisions exist, the above subjects can be dealt with only by general laws, and the courts are bound to disregard any special acts passed in connection with any of them.

In some states certain requirements are laid down with respect to procedure in special and local legislation. Thus in Missouri, notice of such legislation

<sup>1</sup> Coulter *v.* Routt Co., 9 Colo., 263.

<sup>2</sup> Thirty-three in California, thirty-one in Alabama.

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must in every case be given to the locality or community affected. In New York two-thirds of the elected members must vote in the affirmative in order that any appropriation for special or local purposes may pass. The energetic and widespread agitation for municipal home rule during the last decade has led to the adoption in many states of constitutional amendments prohibiting special legislation in municipal affairs and requiring the legislature to pass a general municipal incorporation act. In New York a peculiar system was adopted in 1894. The constitution of that year provides that every bill concerning any particular city must be submitted to the mayor of the city affected, who within twelve days shall return the bill to the governor, together with a certificate stating whether or not it has been accepted by him. If the bill is returned "not accepted" it may nevertheless again be passed by the legislature and become a law if approved by the governor, but the title shall in such case state that it was "passed without the acceptance of the city." The governor retains his right to veto a bill even after it has been accepted by the city.<sup>1</sup> In Mississippi and Virginia no special law can be acted upon until the Committee on Private and Local Legislation has made a written statement as to whether the object of the bill can be accomplished under general law or by court proceeding.

We have already alluded to the principle of classi-

<sup>1</sup> This system was by no means satisfactory to the advocates of municipal home rule. In the convention it was termed a ridiculous result of so much effort.

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fication, and pointed out that when it is based upon essential characteristics, it preserves the character of a law as a general act, although it may refer only to a comparatively small class. The question arises, can an act be termed general, when the class to which it applies consists of but one individual or corporation. In the states where the constitution forbids special acts respecting municipal and local government, the attempt has often been made to achieve the purposes of special legislation by so classing the municipalities that there would be classes composed of only one city. Thus, for instance, an act may be made to refer to all cities having a population of over three hundred thousand, there being only one city of this size in the state. It has generally been held that classification of this kind does not take away the special and local character of the legislation attempted.<sup>1</sup> Especially is this true where the description is such that other towns could never by any possibility come within it. Thus, for instance, a law applying to cities which have a certain population "according to the last census," where there was only one such city, was held clearly special and local.<sup>2</sup>

<sup>1</sup> Devine *v.* Cook County, 84 Ill., 590. Anderson *v.* Trenton, 42 N. J. Law, 486. Luehrman *v.* Taxing District, 70 Tenn., 425. State *ex rel.* Harris *v.* Hermann, 75 Mo., 340. In 1904, a constitutional amendment was adopted in Illinois which permits the legislature to pass special laws for the government of the city of Chicago. After passage by the legislature, all such special laws must be submitted also to the vote of the people of Chicago.

<sup>2</sup> State *ex rel.* *v.* Judges, 21 Ohio St., 11. State *ex rel.* *v.* Ellet, 47 Ohio St., 90.

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The system through which in Ohio municipal isolation was attempted through evasive classification, divided the eleven most important cities in the state among two classes, subdividing these into "grades." Originally Cincinnati composed the first grade of the first class, Cleveland, the second grade, and Toledo the third. But when Cleveland distanced Cincinnati in population, corporate powers continued to be granted to it by its former description. The classification attempted in Ohio was so clearly illegal, that the Supreme Court overthrew the entire system of municipal legislation, and forced the legislature, in 1902, to enact a general code of municipal government.<sup>1</sup> The courts of Pennsylvania have held that a city may reasonably be constituted a class by itself because population is the best basis for the classification of cities, and because it is not impossible that other cities may grow sufficiently to come into the class in question.<sup>2</sup>

Notwithstanding the constitutional provisions, local and special legislation still remains one of the chief sources of abuse and weakness in our legislative system. Such provisions, while they may check the evil,

<sup>1</sup> State *ex rel.* Knisely *v.* Jones, *et al.*, 66 Ohio St., 453.

<sup>2</sup> Wheeler, *et al.*, *v.* Philadelphia, 77 Penn. St., 348. But when, in 1901, the machine caused the Pennsylvania legislature to pass a bill giving it control of the Philadelphia Board of Tax Revision, the Supreme Court held the act unconstitutional. By its terms it was applicable to all counties which were then coextensive with cities of the first class. The wording could refer only to Philadelphia County and was held to come within the constitutional prohibition, as by its very terms it could never apply to any other county. 200 Pa. St. 629.

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cannot eradicate it, because there will always remain cases which will have to be dealt with specifically. It is therefore highly desirable that there should be elaborated a quasi-judicial procedure in which such matters may be settled on their merits on the basis of full hearings of testimony, and with proper notice to all concerned.<sup>1</sup> Referring to certain evils brought on by constitutional limitations on special legislation Governor Gage of California said in his message of 1901, "General laws are often passed which, in fact, are only designed to benefit particular individuals or localities, or to relieve special conditions, but, though the special purpose be good, it often happens that the very generality of the law impairs other and more material rights. . . . It is a matter to be regretted that the constitutional provision against special and local legislation is so far-reaching in its effects. While the evil that was intended to be remedied and guarded against . . . was a very serious one, still the new evil of the enactment of general laws to fit special cases is more serious, and it would be well for this constitutional section to be so amended as to permit necessary exceptions, thereby doing away with this injurious method of legislative evasion."

All states but two (Rhode Island and North Carolina) give the governor a share in legislation by bestowing upon him the veto power. This veto is however not absolute, but merely suspensory. In three of the states, Connecticut, New Jersey, Vermont, the vetoed measure may become a law by being

<sup>1</sup> See Chapter X for a discussion of the character of private legislation.

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repassed by a simple majority of a quorum. In eight states a majority of all the members elected may pass a bill over the veto. But in most states a larger number than a majority is required, two-thirds of those present being the most general rule; in a few states it is three-fifths or two-thirds of the elected members. If a bill having been sent to the governor is kept by him for a certain time (from three to ten days) without being returned or vetoed, it becomes a law. If, however, adjournment intervenes, in eighteen states the bill will not become law without the signature of the governor, so that he can nullify it by merely ignoring its existence (pocket veto). But in an equal number of states the constitution provides, that if kept for a certain time after adjournment<sup>1</sup> without being vetoed by the governor, the measure shall become a law even without his signature.

The express limitations of legislative power with which we have dealt show a strong and intelligent purpose to grapple with the questions of legislative inefficiency and abuse, and it cannot be doubted that favorable results have been obtained by defining the steps of procedure and limiting the power of special legislation. But a complete solution of legislative difficulties will not be looked for in this direction. It must be sought in modes of action and arrangements through which the positive efficiency of legislatures and of individual legislators will be increased. How the sense of responsibility and self-respect, as

<sup>1</sup> From five to thirty days; in some states from three to ten days after the beginning of the next session.

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well as the mastery of legislative problems on the part of legislators, may be developed, we shall consider in subsequent chapters.

An important function of the state legislature is the initiation of proposed amendments to the constitution. In a number of state constitutions: as those of Maryland, Maine, Minnesota, Wisconsin, Virginia, New Hampshire, and New York, there is provision made for taking the sense of the voters as to calling a convention to prepare a new constitution, either at fixed intervals of time, or at the pleasure of the General Assembly; in all states but one, provision is made for the preparation of amendments through the instrumentality of the legislature. The consent of the governor is usually held unnecessary when amendments receive the requisite number of votes in the two houses of the General Assembly. These amendments, when proposed by the legislature to the people and ratified by a majority of the popular vote cast at the election at which they are submitted, become an integral part of the constitution. Without that ratification, in all states except Delaware, the action of the General Assembly in proposing the amendments counts for nothing. In South Carolina an amendment ratified by the electors will not be valid unless it is also accepted by the subsequent legislature.

The proposition of amendments may be made in several ways. In some states, a majority vote of the two houses is all that is necessary; for example in Wisconsin, Arkansas, Missouri, North Dakota, and South Dakota. In other states, a greater proportion

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of the two houses must favor the measure, two-thirds being the prevailing number, as in Wyoming, South Carolina, Tennessee, Texas, Utah, Washington, California, Colorado, Georgia, Kansas, Louisiana, Maine, Michigan, and Minnesota. In Mississippi, the two-thirds majority must be cast for the amendment in votes taken on three separate days. A three-fifths majority is required in Maryland, Kentucky, North Carolina and Ohio. Many constitutions require that two successive General Assemblies vote in favor of the same amendment, either with subsequent ratification by popular vote, as in Pennsylvania, Oregon, Nevada, New Jersey (in which state a special election must be held on the amendment), New York, Indiana, Massachusetts, Rhode Island, Virginia, Connecticut, and Iowa; or without it, as in Delaware, in which state an amendment is adopted when passed by a two-thirds vote of each house in two legislatures successively. In Rhode Island, three-fifths of the people voting at the same election must favor amendments in order to ratify them, which fact makes it extremely difficult to amend the constitution of that state. In Tennessee, once in six years, amendments may be submitted to the people, after they have received a majority vote at one legislature and a two-thirds vote at the next subsequent session. In Vermont, in every tenth session, two-thirds of the Senate may propose amendments to the Lower House and, if it concur, the next Assembly, and a majority vote of the people, may ratify the amendment. In Connecticut, a majority of each house in one legislature and two-thirds of each house in the next are needed to propose amend-

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ments to the people. In Massachusetts the proposed amendment must receive the affirmative votes of a majority of the senators and two-thirds of the House of Representatives during two successive legislative sessions.

## CHAPTER V

### LEGISLATIVE COMMITTEES

WHEN from the study of constitutional limitations we turn to consider the actual organization and procedure of the state legislatures, we are confronted with a frequent lack of correspondence between the constitutional and legal requirements on the one hand, and the methods actually pursued on the other. In no department of the government is there such a frequent departure from the normal rules laid down by constitutional or statute law. The courts are exceedingly punctilious about matters of form in their procedure, and administrative officials, too, are careful to observe the proper formalities in their actions, so as not to give rise to legal doubts of their validity. But the supervision of the courts does not embrace the details of legislative procedure beyond the very general features pointed out in the last chapter, and even to the latter, judicial revision is sparingly applied. It is not considered wise to question the validity of legislative acts even though some irregularities are discovered in the process of enactment. As we have seen, most of our courts accept as conclusive the certification of the presiding officials, and none

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of them go back of the journal, no matter how much these two formal expressions of legislative action may be contradicted by oral or written testimony. On account of this principle and on account of the personal immunity of members of the legislature, the actual occurrences in legislative assemblies and committees are not ordinarily subject to judicial action or control. The observance of the rules of procedure is therefore very largely dependent upon the will and the purposes of the majority in the legislative body. The leaders do not often find it difficult to arrive at an understanding with the members of the minority under which legislation can be carried on largely by common consent. This lax procedure has been encouraged through the general apathy of the people towards the state legislatures. Not greatly interested even in the larger issues before these bodies, the public pays no heed whatever to matters of legislative procedure, the bearings of which can be understood only by those intimately familiar with the rules of parliamentary law. So it has often come about that in states where the majority party has a strong organization or machine, the various forms of procedure have been treated as fictions, and the legislative body has automatically registered, in the last days of the session, and with a downright disregard of rules, those pieces of legislation which the party managers had agreed upon. Thus it is very common that the full readings of bills required by the constitution are entirely dispensed with, that the committee action on certain bills is treated as a pure formality, that objections and demands for roll-calls are ignored, and even that votes,

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which in fact were insufficient, are recorded as satisfying the legal requirements.

It is necessary to bear in mind this frequent disparity between the rules and actual procedure, because the politician often looks upon the rule, not as a restricting norm, but as a flexible instrument to be bent this way or that as his purposes may require. This fact makes it exceedingly difficult to give a general account of legislative organization or procedure which will not be purely formal and artificial. The standing rules vary sufficiently in the different commonwealths to make their study distractingly intricate. When to this are added the various methods and subterfuges by which these rules are evaded or made to serve purposes other than those for which they are plainly intended, the subject resolves itself into the treatment of every motive, method, and trick of political action. We cannot here hope to deal at all exhaustively with these matters; all that can be attempted is to point out the general character of the legal organization and action of legislative bodies, together with the principal exceptions thereto in individual commonwealths; and to follow this by a study of the main lines of extra-legal and illegal modification which are encountered in the various legislatures. In those states which are comparatively free from machine dictation, and in which powerful interests do not weigh heavily upon the legislatures, we may expect the normal forms of procedure to be more carefully adhered to. But as to the machine-ridden states, it is difficult to avoid the conclusion that in them government by discussion has been frequently

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reduced to an empty form; and with a cynical irony, the legal methods of procedure have been turned to alien purposes, so as to make the legislative body a dumb instrument for registering the arrangements desired by the organization.

The state legislatures are in general modeled on Congress; or it might be more correct to say that, though the descendants of bodies which antedated Congress, they have naturally, as the Federal Legislature has become more and more important, been profoundly influenced by the methods of procedure there evolved. The lieutenant-governor, as presiding officer of the Senate, occupies much the same position as the vice-president, although in individual instances he has relatively more power. The legislative speakership has at some distance followed the development of the centralized authority in Congress. The use of a complicated committee system, and the governor's veto complete the analogy. Within these limits, however, wide variations occur. The committees in the Senate are commonly appointed by the lieutenant-governor. In a few states,<sup>1</sup> they are elected by ballot of the senators. In the more numerous house the method of appointment by the speaker is generally in use. Although committee positions often enough bestow very little power, the early part of a legislative session is rendered interesting to the members chiefly by combinations and speculations about the matter of committee assignments. The time of appointment is frequently delayed for various reasons; either because the party managers desire to get the

<sup>1</sup> *E. g.*, Vermont, Wisconsin, Connecticut, Illinois.

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situation well in hand before completing the actual organization of the House, or because of real difficulties in adjusting the desires and activities of new members,<sup>1</sup> or for some other purely political reason. The ideal method according to which men are placed on committees with the business of which they are especially familiar, has to give way in many cases to the purposes and plans of the leaders in power with respect to important subjects of legislation. Committees to which such bills are to be entrusted are composed with great care, unless the organization considers itself strong enough to treat the whole committee system as a pure formality. An example of juggling with the committee system was afforded in the Illinois Senate in 1903. The three committees through which most of the political business was to be transacted were filled entirely with organization Republicans, and a few Democrats. The opposition Republicans were put principally upon such apparently important committees as Railroads and Corporations, both of which, however, did not meet during the entire session.

It is a notable fact that during the last few decades both the number of committees, and the average of membership, have increased rapidly. As an example, we may cite the case of Illinois. In the twenty years between 1877 and 1897, the number of House committees increased from forty to fifty-eight,

<sup>1</sup> Thus in Illinois, in 1905, the House committees were appointed as late as March 6. The House contained ninety new members, many of them able men, not easily subjected to the ordinary organizing process.

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and the average membership from twelve-and-a-half to eighteen-and-a-half; so that the total number of committee positions was more than doubled, rising from 504 to 1062. In 1877, each member was, on the average, on three committees; in 1897, on seven. The largest committee in the former year had seventeen members, in the latter thirty-five. The Senate went even beyond this. By placing upon the Railway Committee forty-one members, or all but ten of the senators, the organization reduced the whole committee system to a sham. A similar increase in numbers is noticeable in more than one-half of the states. It is due, on the one hand, to the desire of members for opportunities to gain distinction and influence; on the other, to the discovery that large committees lend themselves more readily to the uses of the political organization. This increase in committee membership has been most noticeable in states where the party organization is strong. Committee positions constitute a cheap kind of patronage, which helps the managers in paying certain political debts. Moreover, in making the committee so large that it becomes unwieldy and helpless, the rule of the party manager is rendered more efficient. The true work of a committee can of course be best done by a small group of men who may gather around a table, and engage in an informal discussion of the business in hand. To make of it another assembly, even though it be considerably smaller than the House itself, is usually to defeat the possibility of efficient action. When such committees are kept from meeting or have their opinion practically ignored by the independent action of their chairmen,

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the cynicism of the political manager reaches its climax. Occasionally, the motive of creating large committees in certain lines of legislative business has been to strengthen some particular measure or group of bills by thus enlisting from the start the influence and interest of a considerable number among the members.<sup>1</sup> In large committees it is a very common practice to entrust the discussion of particular measures to sub-committees. As these are selected and controlled by the committee chairman, this method is frequently used for the preparation of measures favored by the organization but of such a character as not to commend them to the entire committee. Much of the worst legislation has originated in this manner, and the so-called "ripper" bills and "strikes" quite frequently owe their legislative progress to the sponsorship of some sub-committee, except in cases where the organization is so strong that the individual chairmen can entirely dispense with committee action.

The importance of individual committees depends very largely upon the particular business which occupies the chief attention of any legislative session.

<sup>1</sup> Among the states which have very large House committees are the following: Illinois with an average membership of nineteen; New York with an average of eleven; Pennsylvania with twenty-five; North Carolina with five committees over thirty; Alabama with seven of nineteen and over. Very small committees are found in Michigan, averaging three-and-a-half in the Senate, and five-and-a-half in the House; Wisconsin, averaging seven and two. In Massachusetts the important committees were in 1890 enlarged to a membership of fifteen, in order to give places to the followers of the speaker of that day.

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But on account of the forces which we have already noted, this is not always true, as committees which would naturally be important may never be entrusted with the business which their name implies. Where more normal conditions prevail, the prominence, *e. g.*, of agitation for primary elections, will lead to the appointment of a strong committee on Privileges and Elections, while the discussion of railway taxation will enhance the importance of the committee on Finance and Taxation. But there are certain committees which on account of the permanent importance of the business entrusted to them generally play a paramount rôle in the legislative session. In many legislatures the committee on Rules has acquired great importance through its control of the legislative business during the latter stage of the session.<sup>1</sup> In the majority of the states, however, this committee has not yet followed in the footsteps of its congressional namesake, and confines itself to the bringing in of the standing rules and of occasional modifications.<sup>2</sup> The committees dealing with state revenue and expenditure are naturally of constant importance; they are designated variously as committee on Ways and Means, Appropriations, or Finance; in some states there are in each house several committees dealing with finance. The committee on Contingent Expenses may become important on account of the

<sup>1</sup> This is the case especially in Illinois and New York, in the latter of which states the presiding officers of both houses are members of the respective committees on Rules.

<sup>2</sup> No standing committee on Rules exists in Pennsylvania, New Jersey, and Wisconsin.

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indefinite nature of the appropriations which it may originate, and the consequent ease with which it may be made to subserve political purposes. The defeated candidate for speaker in the House is often made the chairman of the financial committee. A committee which is quite uniformly important is that on the Judiciary. As all bills involving a change of the Common Law, as well as all amendments of the existing general statutory law are referred to this committee, it has usually the largest number of bills to consider.<sup>1</sup> In some states there are two or more committees to which bills relating to changes in the general law may be referred. Thus New York has committees on the Judiciary, on the Code, and on General Laws; the latter being an overflow committee. Massachusetts, in addition to separate committees on the Judiciary, has a joint committee on Probate and Chancery. It is a practice in some states to constitute the delegation from the most important city, a committee on the affairs of that municipality. This method of dealing with metropolitan affairs prevails in California and Colorado.<sup>2</sup> Kansas, on the other hand, has five committees dealing with municipal affairs.

The control of the order in which various measures shall be taken up by the legislature, and the determination of any preference to be accorded to a par-

<sup>1</sup> Thus in Wisconsin in 1905, four times as many bills were referred to this committee as to any other.

<sup>2</sup> In the California Assembly, the San Francisco delegation; in the Colorado Senate, the senators from Arapahoe County (Denver).

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ticular bill, is in the hands of the committee on Rules, in those states in which this committee has been fully developed. In a few states the houses, a short time before the end of the session, create a "sifting committee," which takes charge of all pending bills, except appropriation bills, and selects those which are to be considered by the respective house. In Iowa, a sifting committee has often been used by the houses of the legislature. When first used in 1870, it was composed of the chairmen of the standing committees, but more recently the composition has been different, the speaker of the House, or the presiding officer of the Senate, usually naming the members. The committee is appointed toward the end of the session when the pressure of business has become bewildering to the ordinary member. In 1898, such a committee was created in the Senate three days before adjournment. All bills were referred to it, and it selected sixteen which it reported to the Senate. In 1894, a House committee was appointed about a week before adjournment which selected forty-seven measures, out of all which had been submitted to it.<sup>1</sup> More generally this function of arrangement and selection is performed by a so-called "steering committee," composed of representative members of the dominant party. This committee may be elected by the party caucus or it may be composed informally of the actual leaders in the legislature,—the chairmen of the most important committees and other men actually enjoying to the largest extent the confidence

<sup>1</sup> The Nebraska Senate also has a sifting committee of seven members elected by the Senate.

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of the members of the dominant party. The action of such informal committees is often the determining factor in legislation, because when the closing weeks of the session have arrived, comparatively little important business has usually been accomplished. The sifting and arrangement of matters to be brought before the legislature, when conscientiously performed, is a matter of no small difficulty, as it presupposes a thorough command of the whole field of legislative action. Where the organization is strong, this method of course resolves itself generally into the advancement of a group of measures determined by the party leaders, and the utter ignoring of everything else, unless some measure should be suddenly brought into prominence through powerful newspaper agitation or the pressure of strong interests.

When legislative business is entrusted to a committee, it is not customary to bind the latter by direct orders or instructions designed to control its action. But in general the matter is left to be dealt with by the committee at its discretion.

A larger percentage of bills is reported on in state legislatures than in Congress. The rules of a few legislatures<sup>1</sup> require that every measure committed must be reported back within a certain time before the end of the session. It is in the states in which the political organization is strong that the percentage of bills smothered in committee is largest. Thus during a period of years in Illinois, on the average about thirty per cent. of the bills referred did not

<sup>1</sup> Massachusetts (joint rules), Rhode Island (Senate rules), Maine, Vermont, and New Hampshire (House rules).

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issue again from the committee chamber. While the legislature does not continuously supervise the committee action, it is nevertheless a frequent practice for bills or reports which prove unsatisfactory to be recommitted with special instructions. When a committee reports unfavorably on a measure, there is generally little hope of its passage; and it frequently happens that every adverse report made throughout the session is followed. The burden of proof arrayed against a measure by such action of the committee is so heavy that it can be overcome only if the discussion on the floor brings out new facts of first-rate importance, or if a powerful popular agitation is set on foot. It is the usual practice to allow a committee to make but one report,—that upon which the majority of the committee agree. In certain states,<sup>1</sup> however, the right to express their views in a report and to suggest alternative measures is guaranteed to the minority of a committee by the rules. The practice in Connecticut is to consider the majority report first; if it is accepted the minority report is held to be rejected without further action. Should, however, the majority report fail of acceptance, that of the minority is at once taken up and considered.

In legislatures in which committee action has not degenerated into a mere formality, the work of the leading committees is very arduous, and requires the constant attention of their members after legislative business has gotten well under way. New members need to learn a great many facts and principles, for the knowledge of legal arrangements and of actual

<sup>1</sup> E. g. Connecticut, Wisconsin.

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conditions that is required for effective committee work is very extensive indeed. It is a most unfortunate fact that industry and conscientious watchfulness in committee work can in the nature of things receive so little reward. A committee member may by many days of hard work succeed in exposing some attempted raid on the treasury or grab of public rights. But his chief reward will be in his own conscience, because few people will know of, or care for, his achievement. On the other hand, his action will gain him the deep hostility and bitter opposition of the powerful interests crossed by him; their purpose thereafter will be totally to destroy his influence, so that he may find himself unable to accomplish the things which his constituents are expecting of him.

The influence which the chairman of a committee may exercise over its deliberations and decisions is very great. His experience and knowledge of the law and precedent give him a natural ascendancy in his circle. Through intimate association with other committee chairmen and with the speaker, he is enabled to view the legislative business in its more general relations. If he is a tactful man he will often be able to disarm opposition to an important measure by allowing full freedom of investigation and consideration, and refraining from the use of the parliamentary force at his disposal.<sup>1</sup>

The joint committee of both houses of the legis-

<sup>1</sup> The chairman of the Committee on Railroads in the Wisconsin Senate in 1905 thus succeeded in gaining practically unanimous support for the railway rate commission bill, which was bitterly opposed in its initial stages.

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lature as a method of facilitating legislative business is used extensively in New England, but plays a minor part in other parts of the Union. Throughout the Middle, Southern, and Western states,<sup>1</sup> the use of the joint committee is quite generally confined to formal occasions, such as counting the vote for governor, notification of senators-elect, visiting state institutions, etc. Thus the use of the joint committee in the greater part of the Union is for the most part special, only rare instances of joint standing committees being found. But in some of the Northeastern states, where quite distinct conceptions of the legislative function prevail, the larger proportion of the business transacted in the subdivisions of the legislature takes place in joint committee as may be readily seen from the following table:

State	Number of Joint Committees	Number of Senate Committees	Number of House Committees
Connecticut .....	38	<sup>24</sup> standing <sub>14</sub> select	5
Rhode Island .....	7	13	13
Massachusetts .....	34	<sup>31</sup> standing <sub>3</sub> optional	5
Vermont .....	12	20	23
New Hampshire ....	3	23	35
Maine .....	36	<sup>32</sup> standing <sub>4</sub> select	3

<sup>1</sup> Except in New Jersey, where there are thirteen joint committees. The system here used is to intrust the affairs of the various state institutions to such joint committees. Delaware has a joint committee of Finance. Wisconsin has joint committees on Claims, on Charitable and Penal Institutions, on Printing, and on Fish and Game.

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Thus in the states of Connecticut, Massachusetts and Maine, the joint committee is the rule rather than the exception. It is by no means surprising that this institution should find its widest development in New England. The compactness of interests, the public attention bestowed on legislative matters, the legacy of political experience, the ultra-practical type of the Yankee mind, as well as the comparative smallness of committees, and the traditional conservatism and retention of accustomed forms, serve to render this field a favorable one for the joint action of legislative committees. In the large industrial states, whose political organizations are centralized and dominated by machines, the joint committee receives but scant opportunity for employment. The power of the organization has been such as to minimize the importance of the ordinary committee system, and legislative action becomes largely mechanical, responding to the pressure of the hand that grips the organization lever. It is far more difficult to manipulate a joint committee, in which the public is interested and whose hearings are attended by all persons concerned, than to use the system of separate committees in such a manner as to defeat the public interest, even though maintaining the appearance of careful consideration and normal procedure. Among the great practical advantages of the joint committee system are the saving of time through avoiding duplication, the lessening of the tendency toward the mutual shifting of responsibility, a strong educative influence on the newer members, the increase of efficiency due to intimate contact of men of both houses and of varied experience, the

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closer scrutiny and more intensive investigation of legislative problems. Not the least advantage comes from the fact that the influence of the committee members from the Upper House tends to act as a counter check upon the over-powerful domination of the speaker over Assembly committees.

The potential influence of committee hearings to bring to bear upon legislative action the opinions and desires of the public in a truly democratic manner, has scarcely been realized outside of the Commonwealth of Massachusetts. In that state, committee hearings are a very important part of legislative action. Notice of all hearings is given in the public press, and the committee meetings are well attended, not only by people who have an ax to grind but by citizens of the state who interest themselves in legislative reforms. All testimony brought before the committees is carefully weighed; in fact, the legislature and its committees assume rather a judicial attitude. Petitions are brought before them, testimony is given, arguments are made, and they in general decide the matter impartially upon the basis of all these considerations. The fact that the legislature meets in the metropolis of the state, where those interested in legislation can watch it without special trouble or expense, is a favorable factor; but the General Court of Massachusetts is in all respects nearest the people, and most responsive of any American legislature to intelligent public opinion.

The practice has recently arisen of allowing committees of the legislature to sit in the interval between legislative sessions. The purpose usually has been

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to acquire through investigation a sufficient basis of fact for prospective legislative action. The holdover senators form the personal link between the legislative session appointing the committee and that to which it is to report. Considering the frequency of extra sessions in most states which have a biennial session, we note a certain tendency toward continuity of legislative action, of which the inter-session committees are another indication. Prominent examples of such committees are the Stevens committee (1904), for the investigation of gas prices in New York, which did exceedingly careful and important work; the Committee on Traction Interests appointed in Massachusetts in 1905; and the famous Insurance Investigation Committee appointed in New York in the same year.<sup>1</sup> This activity of a legislative committee of inquiry in subjecting a certain industry or condition to a searching scrutiny, uncovering abuses, putting aside shams, and arriving at a sound basis of fact, is certainly the only safe

<sup>1</sup> An important investigation was undertaken by the Drake committee of the Ohio Senate in 1906. In inquiring into the affairs of Cincinnati, the committee caused the return to the public treasury of over \$200,000, which had been given as gratuities to treasurers, by banks favored in the deposit of Hamilton County funds. The work of the committee was blocked, and its powers of action emasculated by a remarkable decision rendered by a judge of the court of common pleas, who took the ground that the investigating committee was an illegal body, as the constitution of Ohio gave the legislature no authority to appoint a commission with power to take testimony as to alleged corruption in Hamilton County and to compel the attendance of witnesses.

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preparation for legislative action upon complicated industrial and financial matters. As the powers of such a committee to demand the production of evidence generally transcend those possessed by a grand jury, this method bids fair to become very useful for the purpose of dealing with a wide-spread corruption, backed by powerful interests.

The federal courts, it is true, have shown a tendency to limit the power of investigation. They hold that, while the power of the English Parliament to punish for contempt cannot be limited by any judicial procedure such as *habeas corpus*, the powers of Congress, being delegated, are not of this unlimited nature, and that Congress has not succeeded to the powers of Parliament in this matter.<sup>1</sup> Congress has no authority to inquire into the private affairs of a citizen, except where the examination is necessary in such a quasi-judicial proceeding as a contested election, the impeachment of officers of the government, or the trial of one of its own members for disorderly conduct. The Supreme Court has, however, more recently decided, in the case concerning the charges against senators in connection with the tariff on sugar, that "Congress possesses the constitutional power to enact a statute to enforce the attendance of witnesses, and to compel them to make disclosures of evidence to enable the respective bodies to discharge their legis-

<sup>1</sup> *Kilbourn v. Thompson*, 103 U. S., 168. *Councilman v. Hitchcock*, 142 U. S., 547. *Interstate Commerce Commission v. Brimson*, 154 U. S., 447. A Congressional investigation into the affairs of the Central Pacific Railroad Company was smoothed in the Pacific Railroad Company case. 142 Fed. R., 241.

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lative functions."<sup>1</sup> The courts of the states also do not consider the power of legislatures to imprison for contempt unlimited and entirely exempt from judicial interference.<sup>2</sup> But they hold either that legislatures are entitled by the common parliamentary law to compel the attendance of persons within the state as witnesses in regard to any subject in which they have power to act,<sup>3</sup> or they are liberal in their interpretation of powers granted to the legislature by the state constitutions.<sup>4</sup> In order that a committee may exercise this power, an investigation must however be connected with intended legislation, and not merely be instituted for the purpose of using a certain exposé for political advantage. But where a basis for legislation is sought in good faith, either house may compel the attendance of witnesses for legislative purposes.<sup>5</sup> In some states, e.g., Maryland, the power to summon witnesses for legislative purposes is expressly granted by the constitution. The Supreme Court of Wisconsin has pronounced in a dictum that the rule of law excusing a person from giving evidence incriminating himself, has no application in legislative investigations.<sup>6</sup>

On account of the comparatively large membership of the Lower House in the state legislatures, as well

<sup>1</sup> *In re Chapman*, 166 U. S., 661.

<sup>2</sup> *Burnham v. Morrissey*, 14 Gray, 226. (Mass., 1859.)

<sup>3</sup> *Ex parte McCarthy*, 29 Cal., 395.

<sup>4</sup> *Wilckens v. Willett*, 4 Abbott's Decisions, 596. (N. Y., 1864.)

<sup>5</sup> *People ex rel. Keeler v. McDonald*, 99 N. Y., 463.

<sup>6</sup> *In re Falvey*, 7 Wis., 630.

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as the inexperience of the majority of its members, it is natural that a large amount of power should have been concentrated in the hands of the speaker. Through his power of making committee appointments, of distributing the legislative business, of guiding the discussion on the floor, and, with the aid of the Committee on Rules or through an informal steering committee, of controlling or at least influencing the order of business, and determining the opportunities to be accorded the backers of any particular measure, the speaker may build up a powerful influence, if he unites technical knowledge with political tact. The chances for the development of a strongly centralized parliamentary authority in the state legislatures are of course less favorable than they have been in Congress during the last two decades. Yet in some of the larger states, like New York, Pennsylvania, and Illinois, gavel-rule has at times been carried out with more lack of consideration for the political opposition, and especially for the minority in the ruling party, than has ever been exhibited in Congress. While the Congressional speaker has never been accused of systematically working in alliance with corrupt interests, such connection has at times been established in some of the states. In Pennsylvania it was openly acknowledged, with the cynical frankness of the former political masters of that commonwealth. The New York Assembly has perhaps approached most closely to the model of Congress, and under strong and able speakers like Nixon there has been a concentration of parliamentary activities, and a guidance of parliamentary procedure through

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the Committee on Rules, closely approaching the situation in Congress. But in the ordinary legislatures, parliamentary centralization is not carried to such an extent because it is not necessary. The membership is smaller, the amount of business less distracting; there can be more free discussion, and more individual independence of the members. In these legislatures, the speaker owes what influence he may have to his personal experience and ability, rather than to the structural factors involved. It occasionally happens that even in those states in which the organization is most effectual, a successful revolt may take place. Thus in the Illinois Assembly of 1903, the power of the speaker was overthrown by the minority Republicans and the Democrats, when the famous traction bill of that year was up for consideration.

The subject of conference committees in state legislatures does not present many difficult problems, for the cardinal weakness of the legislatures of our commonwealths lies rather in their careless habit of undiscriminating assent to the larger part of the measures presented to them, than in any tendency to obstinate disagreement between rival chambers. The habit of unanimous consent has fastened itself so strongly upon many of our state legislatures, that the arbitral function of the conference chamber is resorted to only upon rare occasions. The general weakness of the party system in our local lawmaking bodies, combined with the usual tacit understanding between the opposing machines, as well as the infrequency of opposing control in the two houses in the present day of sectional majorities, assure the flood of legislation a

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passage free from the friction which necessitates in Congress the compromising agency of the Committee of Conference. When occasions arise for the calling of a conference committee, the practice most widely in use requires that upon the request of one house accompanied by its appointment of a committee for the purpose, the other chamber must send a similar committee of an equal number to state its position and seek a *via media* of common agreement.<sup>1</sup> The conference committee, being by its very reason and nature a special institution, all minor questions of the time of meeting, committee procedure, etc., are left almost altogether to the option of the committee itself. It is a quite general and intrinsically necessary practice to provide that a conference report cannot be amended or altered. Usually, the halves of the committee report to their respective houses, but Massachusetts provides for a joint report to the house requesting the conference. In Ohio the organization phalanx so long in control of state politics established joint rules which made legislative disagreement on matters of detail almost impossible. It was provided that a committee of conference should be appointed whenever any disagreement of opinion should exist between the two houses; that in case this original committee should disagree, another should succeed it; that if either house disagreed to a conference report, it should re-

<sup>1</sup> The usual number is three representatives from each house; sometimes no number is provided in the rules (Massachusetts, Maryland, California); some states require that the conferring members represent the majority of their house (Massachusetts), others by lack of provision allow minority representation (Pennsylvania).

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quest a new meeting of the committee, to which request the other house should accede. While such ample provisions were made, the legislative practice was so responsive to organization demands that the compromise conference was after all of rare occurrence. The legislature of Ohio, like many of its sister bodies, found working agreements between parties and houses of so easy making, that no rough edges were left to be chipped off by the conference chisel. An extreme example of the workings of the conference committee in times of legislative disagreement was afforded in Pennsylvania in 1883. The state government was divided between the rival parties; the governorship and House majority being Democratic, while the Senate was under Republican control. As the state thus stood in the doubtful column, with a national political crisis in view, the question of party control through reapportionment became of vital importance. The two houses being in a hopeless deadlock during the regular session, an extra session followed on its heels. At this point the conference committee became the battlefield of the opposing forces. As a result of many moves and counter-moves, the following rulings took their places among the decisions and precedents of the Pennsylvania legislature,

1. That the conference committee should have power over the whole bill committed to its care.
2. That the House by special resolution might authorize such a committee to consider a bill not presented at that session.
3. That final disagreement upon a conference committee report operated as a discharge of the committee without further action of the House.

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4. That the committee once discharged was not subject to instructions.

It must be remarked that these ultra-liberal rulings were made under extraordinary circumstances. Their value as examples is conditioned by the fact that they probably mark the widest limit of conference power. They cannot by any means serve as a type of the usage in the normally governed legislature. The older practice of compromise through conference still plays an important part in our Congressional legislation. The state legislatures have failed to follow in the path of the national body,<sup>1</sup> largely because of the shifting of main political interest from the local centers to the national one. Now that party warfare carries on its chief manœuvres in the Congressional forum, the inner state struggles no longer take the form of inter-house conflicts. The conference compromise however is still a living force. The spirit exists though the form decays. New England finds the joint committee a more efficient instrument than the committee of conference. The tendency less strong elsewhere works out in the inner organization of the party rather than in the outer organization of the legislature. But this leaves much to be desired. In the growing movement toward more careful and less prolific legislation, the conference, like the joint committee, may come to be an important factor in increasing the efficiency of our legislatures.

<sup>1</sup> Although occasionally, as in the Illinois extra session of 1906, a real conflict occurs and very important matters are decided in conference.

## CHAPTER VI

### PROCEDURE IN STATE LEGISLATURES

LEGISLATIVE procedure among our many commonwealths, while subject to infinite modification and diversity of detail, most generally follows along the line of a certain recognized practice common in substance to almost all our state legislatures. The first step in the process of actual lawmaking occurs when the bill is presented to the house, endorsed with the title and the name of its sponsor. In usual procedure, the introduction of bills takes place at the time appointed in the order of business for the day. A member rising in his place and obtaining recognition, begs leave to introduce a bill. This being tacitly granted, the bill is sent by a page to the clerk who reads the bill by title, upon which the officer presiding announces the first reading of the bill. In most legislative bodies a second reading and announcement immediately follow. However the constitution and usage in some states call for separate readings on different days. Upon the second reading of the bill, it is assigned to such committee as may seem appropriate, in the House of Representatives or Assembly by the speaker, in the Upper House by the lieutenant-governor or

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president of the Senate. At times reference to some particular committee is made at the request or suggestion of the member introducing the bill. After due consideration, if a favorable view is taken, the committee reports the bill back to the house, together with its recommendations thereon. If unfavorable the committee rarely reports.<sup>1</sup> Sometimes the committee reports a recommendation simply for passage, indefinite postponement, reference to some other committee, etc.; or, in other instances, it may report various amendments or make a detailed statement. In case of the report failing to satisfy the house, a motion may be passed to recommit, with or without instructions. A bill may be recommitted at any time previous to its passage. The local legislatures have not to any great extent followed their national prototype in a frequent use of the Committee of the Whole. While it may be convened upon the request of a certain portion of the members present (usually one-sixth), its use is of comparatively rare occurrence.

The bill, once reported, is usually placed upon the calendar for the succeeding legislative day under the title of "Bills ready for engrossment and third reading." At this stage the bill is subject to general discussion and amendment on the floor. If the bill is by the house ordered to be engrossed and read a third time, the clerk passes it over to the proper officials for engrossment. This function is ordinarily performed by the engrossing and comparing clerks, whose

<sup>1</sup> All matters referred to committees must be reported on in Massachusetts, in the Senate of Rhode Island, and in the Lower House in Maine, Vermont, and New Hampshire.

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duty it is carefully to prepare the engrossment and make certain that it is correct in phraseology and exactly similar to the original bill as amended. Their work is usually checked and supervised by a Committee on Engrossed Bills. The usage in many states permits that whenever a bill, fairly written or printed without interlineation or erasure, is without amendment ordered to be engrossed for a third reading, it may be reported to the house as the engrossed bill. The neglect of enforcing the provisions for careful examination and supervision of engrossment and enrolment, at times permits the creeping in of error and misconstruction, through careless or unscrupulous action of subordinates. After engrossment the bill goes to its third reading, on which occasion it receives the final test in the house prior to passage. The progress of the bill may be hastened by its being made a special order for a certain day. This object is also facilitated by the widespread use of the suspension of the rules, particularly in the final days of the session. Once having successfully accomplished its passage through one house, the bill is taken to the other chamber together with a special message announcing its passage. Here, having been read twice by title, it is referred to the appropriate committee, and treated in a fashion similar to that of bills originating in this house. Upon decisive action being taken, a message is sent to the originating house announcing the fact of concurrence or amendment.

Should the bill receive favorable action in both houses, the concurring body returns the bill to that in which it originated, where it is given into the charge

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of the enrolling clerk, who makes a proper copy of the same. It is the function of the Committee on Enrolled Bills to supervise the making of the new copy and the comparing of it with the engrossed bill. When the copy has been made in a satisfactory manner, the members of this committee report the bill back to their house. The engrossed bill remains filed with the clerk of the originating house; while the enrolled bill receives his endorsement, as well as the signatures of the presiding officer of each body. Then the clerk sends the enrolled bill to the governor for his approval or veto. In some states, the bill may by joint resolution of the two houses be recalled from the governor for reconsideration. The approval of the Executive is commonly expressed by his signature, and is followed by a message to the originating house announcing the signing of the bill and its deposit with the secretary of state. Dissent ordinarily takes the form of the governor's returning the bill to the originating house with a message giving his reasons for disapproval. The veto may in a number of states also be exercised at the close of the session by allowing the undesirable bills passed during the final days to expire by the withholding of the Executive signature.

The methods of financial legislation in the state legislatures are full of confusion and are indeed in urgent need of systematization. The unity of a budget in which the resources and necessary expenditures of a state are summarized and balanced is entirely lacking; and in general the members do not at any stage of the session enjoy a fair opportunity to understand the exact nature and mutual relations

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of the various financial proposals of legislation. While a general appropriation bill, covering the regular needs of the departments of government, is usually prepared by the financial committee, any member has of course the right to introduce bills directly or incidentally carrying an appropriation. Such measures are generally referred, not to the committee dealing with appropriations, but to that which has jurisdiction over the special subject matter of the bill.<sup>1</sup> The difficulty of forming a clear conception of the scope of pending financial legislation is augmented by the fact that in many states there are large permanent appropriations which do not need special re-enactment at every session, and whose relation to temporary and annual appropriations it is not easy for the ordinary member to gage. While most appropriations are made in fixed amounts, indefinite appropriations are found in states where no strict constitutional provisions on this matter exist; and even where the latter is the case, the appropriations are often so general and so liberal that, though for a fixed amount, they are very indefinite as to the manner in which the money is to be expended. The last days of the session are usually so crowded with appropriation bills, that it is not possible even for the chairman of the Finance Committee and other leaders to enjoy a complete survey of such legislation. The bills that are passed are then submitted to the governor, who is thus enabled to fix the final character of the financial legislation, although his discretion is

<sup>1</sup> In some states all bills involving appropriations must be referred to the financial committee. See below.

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very much hampered in the states which do not permit the veto of individual items in an appropriation bill.<sup>1</sup> At no stage of the session and not even for a long time thereafter can it be determined with accuracy how much money has actually been appropriated. That such a condition of affairs does not result in a careful administration of state finances is not surprising. Upon the legislature itself it has a most demoralizing effect, especially since so many members are predisposed, on the principle of "do unto others," to vote for almost any appropriation that may come up.

It is a general practice for some state official, the auditor, or controller, or secretary of state, to prepare a statement of the financial condition of the state, to which in most cases is added an estimate of the appropriations necessary for the various departments. This statement is printed and placed in the hands of the legislators. But as most of the latter are inexperienced in dealing with financial and statistical matters, and as there is no financial minister in the legislature, whose duty it is by lucid explanation to give life to dead statistics, these estimates do not have a very enlightening effect upon the average member. In some cases other means have been provided for the

<sup>1</sup> In twenty-nine states the governor has been granted authority to veto separate items in appropriation bills: Alabama, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wyoming.

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purpose of furnishing estimates. The new constitution of Alabama provides that the state officers shall, before the opening of the legislature, prepare a general appropriation bill covering the needs of the various departments and institutions of the state, within the limits of its probable revenue. This bill gives the legislature something definite to work on. In Indiana, the governor, immediately after the November election, appoints a committee from the state legislature, whose duty it is to examine the various state institutions and to make a report upon their condition and their financial needs. In most states, the preparation of the general appropriation bill is left to the Committee on Appropriations, which is called in some legislatures Committee on Ways and Means, or on Finance.

In a number of states the constitution requires that the general appropriation bill shall not contain anything but appropriations for the ordinary expenses of the executive, legislative, and judicial departments of the state, and for the interest on the public debt;<sup>1</sup> in some cases appropriations for the public schools are included. It is also generally provided that all other special appropriations are to be made by separate bills embracing but one subject each. Under the constitution of New York no provision can be attached to the annual appropriation or supply bill unless it relates specifically to some appropriation therein made; this effectually prevents the attachment of

<sup>1</sup> Alabama, Arkansas, California, Colorado, Georgia, Illinois, Missouri, Montana, North Dakota, Pennsylvania, South Dakota, West Virginia, Wyoming.

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riders, dealing with entirely extraneous matters, to appropriation bills. It is not difficult to see the purpose of these various provisions. Experience has shown that where it is possible to combine a large number of miscellaneous appropriations in one measure, the practice known as log-rolling inevitably becomes prevalent. But while these provisions discourage log-rolling, they also make it impossible to have a budgetary law which will deal with all the appropriations of the state and in which an attempt can be made to harmonize financial measures and bring them into proper relation to one another. The Missouri constitution of 1875 established a general order of precedence for appropriation bills. Priority is fixed in the following manner: first, appropriations for interest on the public debt; second, the sinking fund; third, public schools; fourth, assessment and collection of taxes; fifth, the civil list; sixth, eleemosynary institutions; seventh, the pay of the Assembly and all other purposes. Before the Assembly can make an appropriation for any of these purposes, the appropriations for all the preceding ranks must have actually been completed.

All the legislatures have one or more standing committees dealing specifically with financial affairs. In most states there are separate committees dealing with appropriations and with matters of taxation in each house. In some cases, however, both of these aspects of financial legislation are intrusted to one committee. Among other committees which are often found is that on Contingent Expenses of the Houses—a favorite instrument of corrupt politics—and that on

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Retrenchment, which though expressive of a good purpose is rarely of much importance in the revision of financial legislation. Wisconsin has a joint committee on Finance, which, on account of representing both houses and dealing with all of the appropriations, has acquired great influence. The chairmanship of financial committees is much sought after, and very often the defeated candidate for the speakership in the house is made chairman of the Appropriation Committee.<sup>1</sup>

In some states the disadvantages and dangers of the lack of concentration have been recognized and steps have been taken to bring all financial legislation under the supervision of one committee. Thus, in Illinois, the rules provide that all bills carrying appropriations, when reported by any committee, shall then be referred to the Committee on Appropriations; and the New York legislative law requires that all bills involving appropriations shall be referred to the financial committee in both houses. In Wisconsin the old Committee on Claims in 1905 began to use its influence for the harmonizing of financial legislation, by issuing a statement of the exact amounts of all standing appropriations, as well as a list of the bills then before the legislature which in any manner involved money grants. The Committee on Finance continued the work of systematizing fiscal legislation, and of dealing with all measures in their proper relation to one another. A searching analysis of all the financial bills proposed at a session is very essential. In

<sup>1</sup> Governor Higgins of New York first gained political prominence as chairman of the Senate Committee on Finance.

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hundreds of cases members vote for bills without being at all aware of the fact that they carry an appropriation. Were their attention called to the amount of expenditure involved, they would be far more careful in their scrutiny of such individual measures. Governors of commonwealths have often made a special effort to effect reform in financial legislation. Governors Odell and Higgins of New York both made it a feature of their administrations to insist upon careful financial methods; the latter specifically announced that sufficient revenue had first to be provided before he would give his assent to any appropriation bill. Governor Douglas of Massachusetts, in 1905, carefully reviewed the financial condition of the state in a special message to the General Court.

There is a growing tendency to make permanent appropriations for certain administrative and educational activities of the state. Though the freedom of legislatures is limited by this practice, it is of course not in itself harmful as long as the appropriations are originally made with sufficient care and surrounded with proper safeguards. In fact, some of the activities in which the states are now engaged could hardly be carried on with the best of success were it not possible to assure the agents and representatives of the state of a reasonably permanent income to be used for such purposes. Permanent appropriations are used most commonly to provide for salaries of offices created by law, for the work of special departments or commissions, and for the maintenance of educational and charitable institutions. They are

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permanent in the sense that a new statute is not needed at every session to keep them in force, and that actual expenses incurred under them will be paid out of the treasury without annual appropriations. A very common example of this kind of appropriation is a law granting the proceeds of a certain tax (*e. g.*, a two-fifth mill tax) to a state institution. Such a law may of course be repealed by any subsequent legislature, but the amount accruing to the fund, prior to its repeal, will be paid by the state treasurer to the beneficiary institution, and may be expended for its purposes. In a number of states, however, the constitution provides that appropriations can be made only for a certain time, the customary limitation being two years.<sup>1</sup> In these states it is thus impossible to make permanent or continuing appropriations; but even in their case, though appropriations must be renewed annually or biennially, the fact that certain offices and institutions have to be maintained does itself tend to make a large number of appropriations continuous in fact, though not in form. The New York general appropriation bill is composed largely of appropriations which are permanent in fact. In the states in which no such constitutional restrictions exist, the legislature can of course legally appropriate money for an indefinite period. It is held in these states that such a general law is sufficient authority for all payments under it.<sup>2</sup> In Ohio, where per-

<sup>1</sup> Kansas, Missouri, Montana, New York, Ohio, Texas, Mississippi, Nebraska.

<sup>2</sup> *In re Continuing Appropriations*, 18 Col., 192. *Nichols v. Controller*, 4 Stew. and P., 154. *State v. Burdick*, 4 Wyo., 272.

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manent appropriations are forbidden, the Supreme Court has held that if expenses have been authorized without an appropriation being made to pay them, and if the expenses are actually incurred, they create a debt against the state, for the payment of which, however, a proper appropriation is necessary.<sup>1</sup> The states in which permanent appropriations have been most freely used are the following: Colorado, Connecticut, Iowa, Minnesota, New Hampshire, North Dakota, South Carolina, Indiana, West Virginia, Wisconsin, Alabama, Georgia, Kentucky, and Oregon.

It is a provision found quite generally in state constitutions that appropriations shall be fixed and specific. In practice, however, while the specific amount of the grant must be given in the law, the manner in which it is to be spent is frequently left to the discretion of officials. Thus, in California, an appropriation of \$100,000 for the support and maintenance of a Mining Bureau was held to be sufficiently explicit. But this would not be the case where no definite sum is mentioned. Thus an act requiring the controller to draw warrants for such sums as may be due the state printer, would not be a valid appropriation. Governor Lanham of Texas, in a recent message severely criticizes the practice of appropriating lump sums to be spent at the discretion of officials, and urges the desirability of itemized and specified appropriations. It must be said, on the other hand, that effective itemizing could, after all, come only from the expert officials who alone have the necessary practical knowledge of the activities and works con-

<sup>1</sup> *State v. Medbury*, 7 Ohio S., 522.

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templated in any appropriation bill. Many constitutions impose limitations on the power of legislatures to make appropriations for private or local purposes. In Illinois such appropriations are entirely forbidden. In New York, Michigan, and Virginia they necessitate a two-thirds vote of each house. In a large number of states the legislature cannot authorize the payment of any claim under a contract the subject matter of which is not provided for by an existing law.

## CHAPTER VII

### LEGISLATIVE APPORTIONMENTS AND ELECTIONS

A VERY important function of state legislatures consists in the apportionment of the state for purposes of congressional and local elections. Under the democratic theory of our government, the principle has been quite generally embodied in constitutional law that the districts created for a certain electoral purpose shall be as nearly equal in population as possible. In some of the older states there are, however, still in existence conditions of local government which make for very unequal representation. The legislative bodies in other commonwealths have, moreover, frequently strained constitutional theory and law for the purpose of arranging the electorate in such a manner as to bring the greatest advantage to the dominant party in the matter of permanence of power. Congress itself in the earlier part of our history was not free from this practice. In a report made to the Senate of the United States in April, 1832, by a committee of which Webster was chairman, it was stated that "the language of the Constitution upon this subject is equivalent to a direction to apportion the representation among the states ac-

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cording to their respective numbers *as nearly as may be*. If exactness cannot from the nature of things be obtained, then the nearest possible approach to exactness ought to be made."<sup>1</sup> The committee believed that the process theretofore adopted by Congress was unconstitutional and that a purely mathematical system of apportionment should be substituted. Though the theory of this report was not adopted for some time, Congress finally in the act of May 23, 1850, adopted a mathematical basis and instructed the secretary of the interior to allot to the several states their respective numbers of representatives after the census when the population had been ascertained.<sup>2</sup>

In most states, legislative apportionments are based, with more or less exactness, upon population; but geographical lines affect this in a marked manner, as in some states counties are represented, in others townships, in still others groups composed of these units. Extreme inequalities of representation occur in states where the electorate is not divided according to numbers, but exercises its function as grouped in various units of local government. This system is found in some of the older states where the original privileges of local units of government have occasionally been preserved. In a few states (New Jersey, Rhode Island, South Carolina, Maryland) the Senate, like the Senate of the United States, represents units of political government. In South Carolina and New Jersey each county is entitled to one, and only one, senator. The inequality thus introduced is very strik-

<sup>1</sup> Webster, Works, ed. 1853, III, 369.

<sup>2</sup> A similar act has been passed every decade since.

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ing in New Jersey, where counties range from 12,000 to 328,000 are on the same basis in this respect. In Maryland each county is entitled to one senator, and the city of Baltimore to four. As a consequence the senator from Calvert County represents approximately 10,000 people, while each of his colleagues from the city of Baltimore represents over 126,000. In Rhode Island, where each town is entitled to one senator, the city of Providence with its 224,000 inhabitants is put in the same rank as the country village numbering a few hundred persons. A similar system is used for the Lower House in a number of states (Maine, New Hampshire, Rhode Island, Vermont, and Connecticut.) In Vermont, all towns and city wards are on a basis of absolute equality, each being entitled to one member. In Connecticut, towns of over 5,000 inhabitants have two representatives; smaller towns have either one or two, according to their representation before 1874. In the other states mentioned, the town is the basis of representation, each unit being as a rule entitled to at least one member. Massachusetts alone among the New England states has placed the system of representation in both houses on a numerical basis. It was formerly the universal custom in that commonwealth that, where a number of towns composed a single district for the election of a representative, the office was passed from town to town in regular rotation. This system is, however, gradually being abandoned; and in an individual instance a member was recently re-elected for a fourth term, though his district comprises ten towns. The injustice of the antiquated systems referred to

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above appears clearly when it is considered to what an extent the cities in such states, which frequently contain the majority of the population and pay by far the greater portion of the taxes, are under-represented in the houses of the legislature. The political results of this unrepresentative and unproportional system are especially deplorable. The scantily populated and over-represented rural districts constitute areas most readily subject to corruption, and electorates as well as their representatives are freely bought and trafficked in. Ordinarily the state machine in these commonwealths is stronger and more corrupt than any city organization.

In New York, where special provision is made for restricting the representation of the largest city, which may never have over one-third of the legislature, the Senate consists of fifty, representing counties or groups of counties, and the Assembly of one hundred and fifty, each man representing a county, or a district into which counties are divided in accordance with population. Pennsylvania has a similar system. In Delaware, the Senate consists of seventeen members and the House of thirty-four chosen from the hundreds into which the three counties of the state are divided. In the Southern states a greater uniformity of the basis of representation exists as a result of reconstruction. South Carolina alone gives one senator to each county. In the majority of the Southern states, senators are chosen from special single-member districts. For the membership of the Lower House most of these states take the county as a basis, allotting representatives according

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to population. In the North Central, and the Western, states the prevailing system, subject to exceptions, is that of single-member districts for both houses. In Ohio and Missouri this system is combined with county representation. In Montana and Idaho each county is entitled to one senator, whatever its population may be. In Illinois the Senate and House districts are identical, each district returning one senator and three representatives. A similar arrangement prevails in Minnesota and North Dakota.<sup>1</sup>

The art of gerrymandering aims to eliminate or restrict the representation of the minority party through an arrangement of congressional and legislative districts, which by combining majority and minority communities will give more representatives, though with smaller pluralities, to the party in power. But it frequently happens, with our unsettled political conditions, that in a sudden reaction this narrow margin may be overturned, and the plan designed to render one party's stay in power of long duration is converted to the advantage of its opponents. By a shrewder use of this method, the vote of the opposition is massed in as few districts as possible, leaving the remainder ordinarily an easy conquest for the dominant party. From the point of view of party interest, this plan is in the long run usually found a more profitable one than that in which the new arrangement is superficial and the party margin dangerously small. It is also more alluring to the ordinary legislator, as it takes far better care of local

<sup>1</sup> For a fuller discussion see Haynes, "Representation in State Legislatures."

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and special interests than its earlier counterpart, which is designed more for the benefit of the party at large. In the eyes of the politician, as one of the most scientific of reapportionment architects cynically remarked, "apportionments are not made to keep men in Congress, but to permit other men to get there."<sup>1</sup> On the other hand, in states where the federal organization is strong, the wishes of the majority congressmen often play a predominant part in the division and construction of districts. Sometimes advantage is taken of rearrangement opportunities to eliminate a member not in favor with the dominant forces by consolidating his district with that of a neighbor of greater local strength.

Types of irregularly shaped congressional districts, framed and fashioned so as to further special and personal political interests, are found in all sections of the country. Examples of the so-called "shoe-string" districts exist in many states, although the most noteworthy instances were formed in the South during the struggle for race supremacy in politics, when the gerrymander was frequently resorted to as a convenient method of eliminating, or at least minimizing, negro influence. Mississippi, Alabama, Missouri,, and South Carolina furnished

<sup>1</sup> W. T. Price, who enunciated this theory in the words above, furnishes a striking example of its occasional truth in practice. In 1881 Senator Price was chairman of the joint committee on Apportionment in the Wisconsin legislature. Repeatedly disappointed in his aspirations for the congressional nomination, he came to an understanding with the Democratic leader of the Senate, by which they carved out districts fitted to their needs, sending them to Washington in 1882 and again in 1884.

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the most striking examples of freak districts, composed of counties of divergent interest, and connected in some cases merely by corners. The apprehended danger being greatly lessened, the present apportionments are not nearly so unreasonably shaped as those of previous decades. Illinois to-day presents in certain of her congressional districts convenient examples of "scientific gerrymandering." The "saddle bag district" (the Twenty-third), comprises two groups of counties at different sides of the state, so connected as to crowd as many Democratic counties as possible into one district and thus secure Republican seats in nearby districts by eliminating the vote of hostile localities. The "belt line district" (Eleventh), so-called because it runs around Cook County, and the Fifteenth district, which is similar in shape, were also given their peculiar form for party reasons. In this state as in a number of others, the conflicting parties have been competitors in freak apportionment, the Democratic gerrymander of 1893 rivaling its Republican counterparts of 1881 and 1901. Among the most striking examples of oddly-shaped congressional districts are the following: The Fourteenth in Missouri, the original shoestring district, which formerly had the largest population of any district in the state; the Fourth and the Seventh in Alabama; the Third in Iowa. The more uniform development of the economic life of our country has, however, lessened the evil effects of grouping the electorate in districts of somewhat bizarre form.

There are many examples to prove the dangerous nature of this weapon to its wielders. Not long after

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the Democratic rearrangement of 1893 in Illinois, the party had fewer representatives from that state in Congress than at any date for decades. The Ohio Democrats, in 1892, were able by skilful redistricting to place enough Democratic counties in McKinley's district to deprive him of his seat in Congress. But as a direct result McKinley was forced into a larger field, the reaction making him governor of Ohio in 1893 and again in 1895. In 1881, the Wisconsin Republicans divided their state so as to return three Democrats and six Republicans to Congress, but in the election of the following year, the figures were exactly reversed. Although, in 1890, the Democratic control of Wisconsin was complete and the party gerrymanders were masterful, the year 1892 saw the Republican members of Congress from that state increased in number from one to four; and in 1894 a solid Republican delegation was returned. Certain states have, through the retention of antique systems of town and borough or county elections, acquired an extreme inequality of local representation without resorting to the weapon of the gerrymander. In New England, the birthplace of the gerrymander, we find examples of its smoothest working. New Hampshire and Maine, in spite of difficulties raised by strict constitutional provisions, succeed in limiting the minority to the minimum of local representation.

The apportionment is in most states made at the session succeeding the decennial year when the population of the state has been ascertained by the national census; some states also use the intermediate census made by their own government as a basis for electoral

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divisions. The common practice assigns the division of the state altogether to the legislature, but in some states, as in Michigan and New York, the legislature, after providing for the Senate districts, merely determines the number of members of the Lower House to which each county is entitled, and leaves the fixing of the district boundaries to the local authorities.<sup>1</sup>

In order to limit the discretion of legislatures in the matter of apportionment and to oblige them to make a more equitable division of the electorate, strict constitutional provisions have in many states been adopted. A good example of a detailed regulation is found in the New York constitution of 1895 (Art. 3, Sec. 2). This constitution provides that the Senate shall consist of fifty members, the Assembly of 150; that the apportionment is to be changed by the legislature after the enumeration of 1905 and every ten years thereafter. The Senate districts are to contain as nearly equal a number of inhabitants as may be; they are to be compact in form, consisting of contiguous territory. No county is to be divided save to make two or more Senate districts wholly

<sup>1</sup> In 1893, in the case of *Baird, et al., v. Supervisors of Kings County* (138 N. Y., 95), the New York Court of Appeals held unconstitutional a division of a county by the local authorities into Assembly districts whose population ranged between 31,685 and 102,805. A year later, when this unequal representation had been modified so that the districts varied only from 48,944 to 61,263, the arrangement was held valid by the Court of Appeals, even though it was admitted that the apportionment had been made with the object of giving equal representation in the Lower House from the county to two parties quite unequal in strength. (*Matter of Baird, et al.*, 142 N. Y., 523, 1894.)

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within such county. No county is to have more than one-third of all the senators, or any two adjoining counties more than one-half. If a county having three or more senators is entitled to a greater number, the senators allotted to it shall be given in addition to the fifty already provided for. Each county, with one exception, is entitled to at least one member of the Assembly; in the counties entitled to more than one member, the Board of Supervisors or the Common Council make the apportionment. But each Assembly district must be wholly within a Senate district, and no township or city block is to be divided. Legislative apportionment is subject to review by the Court of Appeals at the suit of any citizen.

The New York Court of Appeals had before this shown itself rather reluctant to interfere with the legislative discretion in matters of apportionment. Great inequalities had existed under the later acts. Thus the act of 1879 gave one representative to Suffolk County with 50,330 inhabitants; two to Cattaraugus with only 45,737, and three to St. Lawrence with 78,014. Governor Robinson spoke of these inequalities as admitting of no apology or excuse. But he was powerless in the matter, since a veto of the law would have left the still more objectionable act of 1866 in force. Under the act of 1892 also there were some glaring inequalities; the Twelfth Senate district had only 105,720 inhabitants, the adjoining Thirteenth 241,138. This time St. Lawrence with 80,679 inhabitants received only one assemblyman, while Dutchess with 75,078 received two, and Albany with 156,748 received four. The Court of Appeals,

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which was called upon to decide on the constitutionality of this act, refused to interfere with the discretion of the legislature.<sup>1</sup> The principle upon which the Court based its decision was stated in the following language: "The discretion necessarily vested in the legislature must be finally disposed of by it, unless there is such an abuse of that discretion as to clearly show an open and intended violation of the letter and spirit of the Constitution." The Court was also strongly impressed with questions of expediency in the situation, as is apparent from the argument in the opinion, that the effect of setting aside an apportionment act would be to cause every subsequent act to be brought before the courts for review, which might happen at a critical time; to originate the greatest confusion at the impending election with a possible total suppression of it; and at all events to continue in force an act containing greater inequalities than the one attacked. These considerations were sufficient to induce the Court to say that "only in a case of plain and gross violation of the spirit and letter of the Constitution should it exercise the power."

The Supreme Court of Illinois has been similarly disinclined to interfere with legislative apportionments.<sup>2</sup> It held that the courts cannot inquire into the motives which have influenced the legislature in making an apportionment. If the constitutional requirements of compactness of territory and equality of population have been applied at all, the Court will not interfere, though the nearest possible approxima-

<sup>1</sup> *People ex. rel. Carter v. Rice*, 135 N. Y., 473 (1892).

<sup>2</sup> *People ex rel. Woodyatt v. Thompson*, 155 Ill., 451 (1895).

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tion to these requirements may not have been attained. The Court held that an act apportioning senatorial districts is unconstitutional, if it appears that the constitutional requirements of compactness of territory and equality in population have been *wholly* ignored, and not considered or applied to any extent. But if considered and applied, although to a limited extent only, subject to the more definite limitations, the act is constitutional, although the legislature may have imperfectly performed its duty. “ . . . As the courts cannot make a senatorial apportionment directly, neither can they do so indirectly. There is a vast difference between determining whether the principle of compactness of territory has been applied at all or not, and whether or not the nearest practical approximation to perfect compactness has been obtained. The first is a question for the courts to determine; the latter is for the legislature.”

The Supreme Court of Kansas in an earlier case leaves considerable discretion to the legislature in the matter of apportionment.<sup>1</sup> Justice Brewer says, in giving the opinion of the Court,—“ An apportionment cannot be overthrown because the representatives are not distributed with mathematical accuracy, according to the population. Something must be left to the discretion of the legislature, and it may, without invalidating the apportionment, make one district of a larger population than another. It may rightfully consider the compactness of territory, the density of population, and also, we think, the probable changes of the future in making the distribution of representatives.”

<sup>1</sup> *Prouty v. Stover*, 11 Kans., 235 (1873).

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A most extreme position was taken by the Supreme Court of Appeals of Virginia<sup>1</sup> in declaring that "the laying off and defining the congressional districts is the exercise of a political and discretionary power of the legislature, for which they are amenable to the people whose representatives they are." This opinion, which was given by the Court without any discussion of the question, was declared although specific constitutional restrictions upon the legislative power had been invoked.

Courts in other jurisdictions have recently taken a more decisive stand against the abuse of legislative discretion in districting the state for electoral purposes. The state of Michigan suffered a good deal from frequent unscrupulous gerrymandering, as the constitution did not prescribe a definite period of apportionment. The Republicans in 1885, and the Democrats in 1891, in the first case upon a majority of less than 4,000 in a total vote of 400,000, so gerrymandered the senatorial districts as to yield their own party twenty-one senators and their opponents eleven. Under the apportionment of 1891, eight counties with a population of 40,000 were formed into a district having one senator, and nine adjoining counties with 97,000 inhabitants were given the same representation. Both of the acts mentioned were held unconstitutional by the Supreme Court, which decided among other things that it was not a due exercise of legislative discretion under the constitution, to give a county of less population than another greater representation, and that the discretion of the legislature

<sup>1</sup> *Wise v. Bigger*, 79 Va., 269 (1884).

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must be honestly exercised so as to preserve the equality of representation as nearly as may be.<sup>1</sup> The judges, in their written opinions, used very strong language in denouncing the practice of gerrymandering. Chief Justice Morse declared that the courts alone could in this matter save the rights of the people and assure them of equality in representation; and another justice said, "Such laws breed disrespect for all law, for law makers become law breakers."

The Supreme Court of Wisconsin has taken especially advanced ground in enforcing constitutional limitations upon the discretion of the legislature.<sup>2</sup> The court decided that "an apportionment act may be judicially declared void for violation of a constitutional requirement of apportionment according to the number of inhabitants, when the disparity in their numbers, in the districts created, is so great that it cannot possibly be justified as an exercise of judgment or discretion. A constitutional requirement of apportionment according to the number of inhabitants in creating Assembly and Senate districts, is violated by an apportionment act in which, with the average population of 51,117 for a Senate district, the number of inhabitants in the respective districts created ranges from 37,000 to 68,000; and in the Assembly districts, with an average of 16,868, it ranges from 6,000 to 38,000. Such an act is not an 'apportionment' in any sense of the word, but is a

<sup>1</sup> *Supervisors of Houghton County v. Blacker*, 92 Mich., 638. *Giddings v. Blacker*, 93 Mich., 1 (1892).

<sup>2</sup> *State ex rel. Attorney General v. Cunningham*, 81 Wis., 440. *Lamb v. Cunningham*, 83 Wis., 90 (1892).

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direct and palpable violation of the Constitution, bearing upon its face intrinsic evidence that no judgment or discretion was exercised in an attempt to comply with the constitution. The whole act must be held void if constitutional requirements are violated in the formation of some of the districts." In the second case the Court decided that "any number of legislative violations of plain and unambiguous constitutional provisions regarding the apportionment of legislative districts cannot be regarded as abrogating such provisions. . . . The unnecessary inequalities under the apportionment of July, 1892, such as one Assembly district having three times the population of another or one Senate district having double that of another, are held to render the act invalid."

The Supreme Court of Indiana in the same year also announced the doctrine of a stricter limitation of legislative discretion.<sup>1</sup> It held in substance: "The legislature has no discretion to make an apportionment in disregard of the enumeration of inhabitants authorized to vote, as provided for in the Constitution; and because exact equality is not possible, the General Assembly is not excused from making such an apportionment as will approximate the equality required by the Constitution. This rule forbids the formation of districts containing large fractions unrepresented where it is possible to avoid it, while other districts are largely over-represented. While the General Assembly has much discretion in disposing of the fractions of the unit of representation, yet it is not beyond control. No scheme for senatorial dis-

<sup>1</sup> *Parker v. State*, 133 Ind., 178 (1892).

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tricts can be lawfully devised in which a county having less than the unit of population for a senatorial district can legally be entitled to vote for two senators, where the constitutional provisions require equality in representation. A county having more than the representative unit of population cannot be denied the right to a separate representative."

In deciding upon questions of apportionment the courts often face a difficult problem in the fact that by declaring the act under consideration void, the state is left at the mercy of still more intolerable conditions under earlier acts. In the Michigan cases of 1892, the Supreme Court held void not only the apportionment of 1891, but also the act of 1885, under which three elections had been held; and prescribed that election notices should be issued by the secretary of state under the old law of 1881, unless a new and valid apportionment should be made by the legislature. In the Wisconsin cases the Court took cognizance of electoral conditions, but, refusing to be influenced by them, declared only the act before it invalid. It did not investigate the earlier acts as to constitutionality, although the separate opinions show that these acts were in the same class with the law held void. The Court, however, did suggest action by extra session, as alternative to elections under a previous act. While the Supreme Court of Michigan decided the Michigan acts of 1891 and 1885 both unconstitutional, the Indiana Court declared contrary to the constitution two acts of 1891 and 1879, but refused to consider the constitutionality of the act of 1885, as this question had not been brought before it.

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This matter was given careful consideration by the New York Court of Appeals, but an opposite conclusion was arrived at; the very fact that the earlier acts were also contrary to the constitution was made a reason for upholding the act before the Court. Regarding this subject, Justice Peckham used the following language:<sup>1</sup> "If the act of 1892 is void, the act of 1879 is also plainly void and no election of members of the Assembly should be tolerated under it. This might relegate the people to the act of 1866, and thus we might have an attempt at an election for members of the Assembly under an act a quarter of a century old and a legislative representation of the people of that time. This would be a travesty on the law and upon all ideas of equality, propriety and justice. We are compelled to the conclusion that this act of 1892 successfully withstands all assaults upon it and is a valid and effective law."

In order to eliminate the evils accompanying the present system of apportionment, with its strong temptation to gerrymander, various alternative plans have been proposed. They have, however, not as yet been proven in practice to possess the remedial virtues urged in their behalf. According to the customary attitude among the people, a great deal of attention has been devoted to the effects of the present inadequate system, while comparatively little has been paid to its source. The palliatives that have been suggested include elections at large, apportionment by congressional action, cumulative voting and the quota system of proportional representation; but while ad-

<sup>1</sup> *People ex rel. Carter v. Rice*, 135 N. Y., 509.

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mitting the special advantages of each, it is not clearly evident that any one of the proposed changes would completely bring about the desired result of fair and equal representation of interests and sections as well as of population. The system of minority representation in use in Illinois, where each Assembly district elects three members and every voter is given three votes, has resulted occasionally in entirely destroying freedom of choice, and making a nomination equivalent to election. As the members of the minority party can always by massing their votes be sure of electing one representative, arrangements have often been made by the machines of both parties whereby only three candidates, two representing the majority and one the minority, are placed in nomination. In a recent election in Cook County, only fifty-nine candidates had been nominated to fill the fifty-seven positions available. This assurance of election had a most undesirable effect on the quality of the material selected by the political organizations to fill legislative positions.

Under the usual constitutional provision that each house shall judge of the election and qualifications of its members, the federal House of Representatives and the houses of the state legislatures determine authoritatively and finally, in the case of a contest, who is to be admitted to the rights of membership. The courts do not ordinarily interfere with the exercise of this power unless specific constitutional provisions exist.<sup>1</sup> Specific qualifications are often de-

<sup>1</sup> *Hughes v. Felton*, 11 Colo., 489. *Coddington v. Buffet* (Md.), 45 Atl., 204. *Naumann v. Canvassers of Detroit*, 73 Mich., 252. See, however, *In re Gunn*, 50 Kans., 155 (1893).

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manded by the constitution for membership in the legislature. It is not, however, common for the legislature to be called upon to vacate a seat on account of the absence of such constitutional qualifications. Among the qualifications most generally required for the Senate, are residence in the state (the maximum, seven years, in New Hampshire; six years, in Kentucky), and residence in the district which the senator represents (maximum, two years, Illinois and Louisiana). Often there is an age qualification (the maximum being thirty years, in six states). For membership in the Lower House the maximum qualification of residence is five years (Illinois and Louisiana), and of residence in the district represented, two years. A few states have an age qualification (twenty-one, twenty-four, or twenty-five years). In West Virginia, salaried officials of a railway are excluded; in Kansas, Georgia, and West Virginia, any person who has embezzled or misused public money; in Nebraska, any one concerned in a state contract. Some constitutions provide that officers of the federal, the state, or any city or county, administration are not eligible to the legislature. But it has been held that such inferior officers as justices of the peace and deputy clerks of court are not within this prohibition.<sup>1</sup>

The cause for contesting an election may be, of course, the absence of the qualifications demanded by the constitution; but it is more usually based upon some alleged irregularity in the election, such as a

<sup>1</sup> Opinion of the Justices, 68 Me., 594. *People v. Green*, 58 N. Y., 295.

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miscecount, or the presence of bribery or other corrupt practices. The discretionary nature of the power over elections renders it very important, especially at times of great political excitement and close party votes, when it will generally be easy to adduce at least plausible evidence of illicit practices in the election of members.

The procedure followed in cases of membership contests varies in the different legislative bodies, and depends entirely upon the convenience and desires of the legislature in question, as in this matter no legislature is bound by the acts or rules of its predecessors. Nor will the courts interfere in this procedure. It is indeed, ordinarily held that they may by *mandamus* compel the election officers to return the results of a vote; but the legislature is not bound by an election certificate in determining the right of a member to a seat. The Supreme Court of Michigan refused to grant a writ of *mandamus* at the instance of a candidate for the office of state senator to compel the Board of Canvassers to recount the ballots, on the ground that, the Senate being the absolute judge of the elections of its own members, a recount would be meaningless unless ordered by that body.<sup>1</sup> The procedure in election contests before the United States House of Representatives is governed by the provisions of the Revised Statutes (Secs. 105 to 130). This statute is very anomalous in that, though created by the complete lawmaking agency and embodied in the statutory law, it is of course not binding on the House of Representatives itself, no more than the rules of a former

<sup>1</sup> *Naumann v. City Canvassers of Detroit*, 73 Mich., 252.

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House would be, since the House alone is the judge of the qualifications and election of its members. The House can therefore at any time depart from this statute, make different requirements, and follow a different procedure. But as long as the House itself adheres to the statute, it is of course binding on individual contestants. Under the statute, notice of the contest must be given within thirty days after the results of an election have been determined. The member whose right is assailed must answer within thirty days, and ninety days are allowed for taking testimony. There are explicit requirements with regard to the taking of depositions and their submission to the House. An election contest differs from an ordinary action at law in that it is not looked upon as a suit between two persons for a seat in Congress, but as a public matter in which the interests of the constituents are involved. It is therefore not permissible that such a contest be settled by stipulation between the parties, nor can judgment be taken by default; but the case must be decided after thorough investigation of the evidence.<sup>1</sup> When the qualifications of a person for a seat in the legislature are questioned it is the legal requirements that are involved and not his moral character. The latter can be attacked only in proceedings for expulsion. In this matter, too, the discretion of the legislature is usually unlimited, with the exception that a member reelected by his constituents after expulsion may not ordinarily be expelled for a second time. The United States House of Representatives has decided that a

<sup>1</sup> See *Follett v. Delano*, 2 Bart. Elect. Cas., 113.

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member may be expelled for offenses committed before his election, especially if they were not known to his constituents.<sup>1</sup>

A question of great political importance arises when a legislative house is divided into two bodies, each of which claims to be the rightful house, legally authorized to transact the legislative business. The general rule in such cases is to consider that body as legally organized which has maintained the regular forms of organization according to the laws and usages of the legislature. But the questions of fact arising under this legal principle are often very difficult to determine, and give rise to serious political danger. Where a house contains hold-over members, its organization is perpetual, and difficulties, though by no means excluded, are not so apt to arise, because the new members are not entitled to create a separate organization. A federal statute empowers the clerk of the preceding House of Representatives to preside at the organization of the new House, and to inscribe on a roll the names of representatives whose credentials are sufficient under the law. There is of course some danger of an abuse of this power at times of close party struggle, and great legal difficulty is presented by the fact that the new House in determining upon its organization cannot be bound by such a statute, although it may voluntarily submit to it.

A number of serious controversies between rival houses have occurred in the states. The United

<sup>1</sup> See "Congressional Globe," Forty-second Congress, 3rd Session, Part III, p. 1651.

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States Senate in determining upon the elections of its own members may be called upon to decide a contest between factional houses as far as a senatorial election is concerned. In the case of *Sykes v. Spencer*,<sup>1</sup> the Senate refused to recognize the certificates of election of members of a state legislature who were not in its opinion legally entitled thereto, while it accepted the votes of members who though without such certificates were in its opinion legally elected. In the words of Senator Carpenter, "it inquired into the fact rather than the evidence of fact." It was decided in an Alabama case,<sup>2</sup> that a body of men claiming to be the General Assembly of Alabama, and actually comprising a majority of the members legally elected, constituted the lawful legislature of the state, though it did not assemble in the Capitol, and the lieutenant-governor did not preside in the Senate. In Kansas it was decided,<sup>3</sup> that where a majority of the members of the House of Representatives, each holding a regular certificate of membership, meets at the customary time for the commencement of a session in the hall of the House at the Capitol, and perfects an organization as the House of Representatives, such a body is duly organized although the governor or the Senate or both refuse to recognize it. Nor is its power destroyed by the organization in the same room of another pretended House of Representatives having less than a constitutional quorum, although this second body is recognized by

<sup>1</sup> Forty-third Congress, 1st Session, Rpt. 291.

<sup>2</sup> *Ex parte Screws*, 49 Ala., 57.

<sup>3</sup> *In re Gunn*, 50 Kans., 155.

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the governor and the Senate as the *de facto* House of Representatives.<sup>1</sup>

An extreme case of the use for political purposes of the power over contested elections was made by the two houses of the Colorado legislature in 1903. The Republicans in the House, alleging election frauds, unseated just enough Democrats to assure a Republican majority on joint ballot in the election of a United States senator. Before the election could take place, the Democratic majority in the Senate by a like procedure regained control of the joint session. The Republican lieutenant-governor attempted to recognize the Republican minority as the Senate. He appealed to the governor, a man of the same party, for troops, but was refused. The Democrats of both houses then assembled in joint session, in all a bare majority of the legislature, and re-elected Senator Teller. This incident shows the extreme danger that may occur when the two houses are of different political complexion, and when the margin is so small that the unseating of a few members of either house will have a decisive influence in the senatorial election. A similar controversy was threatened in West Virginia in 1899, when there was a Republican Senate and a Democratic House.

<sup>1</sup> In this case the Court said: "The House of Representatives is not the final judge of its own powers and privileges in cases in which the rights and liberties of the subject are concerned; but the legality of its action may be examined and determined by this Court. The House is not the legislature but only a part of it, and is therefore subject in its action to the laws, in common with all other bodies, officers, and tribunals within the state."

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Aside from determining the qualifications and election of their own members, the legislatures in many states have the right to try contested elections for various state offices.<sup>1</sup> In California, Pennsylvania, and Delaware, such contests are decided by a committee of both houses. In some states the legislature constitutes in effect the supreme canvassing board for all state elections. An extreme use of the power of the legislature over state elections occurred in Colorado in 1905. On the face of the returns the Democratic candidate for governor had been elected; but the legislature threw out enough votes to elect the Republican candidate, Peabody; and was sustained therein by the courts which sent a number of Democratic politicians to prison for election frauds. A compromise was, moreover, made with Peabody, according to which he was to resign his office on being declared elected, and to permit the Republican lieutenant-governor, a more popular man, who had been most prominent in the unseating controversy, to succeed him.

In Rhode Island before 1893, as originally in all New England states, a majority vote was necessary to elect any state officer. In case of failure to elect, which was comparatively frequent under this system, the respective officers were elected by the legislature

<sup>1</sup> Governor and executive officers in New Hampshire, Massachusetts, Maine, Vermont, Rhode Island, North Carolina, Arkansas, Texas, Colorado, Illinois, Nebraska, Georgia, Alabama, Missouri, Mississippi. Governor and lieutenant-governor in Virginia, West Virginia, Indiana, Iowa, Kentucky, Tennessee, Oregon, South Carolina, Maryland.

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in joint session. The Constitution was, however, amended in 1893, by reducing the requirement for election to a plurality.<sup>1</sup> In Connecticut a similar constitutional requirement, which has also recently been abolished, caused a serious deadlock in 1891-92. In three elections in succession had the Democratic candidates for state offices received a plurality, though not a majority, of the popular vote; and each time a Republican majority of the legislature, representing a minority of the people of Connecticut, placed the Republican candidates in possession of the contested offices. The close election of 1890 found the Democratic candidates for lieutenant-governor, secretary of state, and controller elected by a majority, the governor by a decisive plurality, but by a narrow majority, dependent for existence upon the omission of 100 Prohibition votes. The legislature consisted of 140 Republicans representing districts whose vote amounted to 73,144, and 134 Democrats, whose electorate was over twice as numerous, comprising 195,840 votes. The Senate was Democratic, the House Republican. The Republicans refused to ratify any of the Democratic elections to the state offices. The contest was bitter and prolonged, the Republican governor of the preceding period, Bulkeley, holding over. Regarding him as a "usurper," the Democratic Senate refused to pass the appropriation bills. The Lower House was even more obstructive, hoping by holding up the minor state offices to force a surrender on the governorship. The state government was left without funds, but the holdover controller, on the ad-

<sup>1</sup> The older requirement still exists in New Hampshire.

vice of bi-partisan counsel, obtained money and expended the same where he deemed it necessary, under authority derived from general acts of a period long past. The struggle over the contest was finally taken to the courts, where it was ultimately decided, under the constitution, that as the legislature had failed to make its decision within two days, the executive of the preceding term held office *de jure* as well as *de facto*. This decision was reluctantly received, relieving an anomalous condition which had lasted the better part of two years, during which the state had been unable to exercise its will through its legislature or its properly elected officials. The succeeding election returned the wronged Democrats to power with no question as to majority.<sup>1</sup>

The legislatures in some states are by constitutional provision entrusted with the power of electing certain state officers. This arrangement was used more generally in the earlier decades of our national life. The more recent tendency has been toward popular election of the more important officials of the state. The following table will give a summary view of the direct electoral function of state legislatures. The following officials are elected by the legislature in joint session:

<sup>1</sup> The important subject of elections to the United States Senate, which on account of the limitations of space cannot be dealt with in this volume, has recently been taken up by George H. Haynes, "The Election of Senators" (1906). See also John Haynes, "Popular Election of United States Senators," in J. H. U. Studies, 1893. The removal of the senatorial elections from the state legislatures will greatly relieve the political tension in those bodies.

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The state treasurer, in New Jersey, Maryland, Delaware, New Hampshire, Maine, Tennessee.

The secretary of state, in Vermont, New Hampshire, Maine, Tennessee.

The controller, or the auditor, in New Jersey, Virginia, Tennessee.

The attorney-general, in Maine; the solicitor-general, in Georgia.

The commissary-general, in New Hampshire.

The state printer, in Kansas.

The governor's council of seven members, in Maine.

Judges of various courts are elected by the legislature in the following states: Vermont, Rhode Island, Virginia, South Carolina, Georgia, Louisiana, New Jersey.

In the exercise of the electoral function the legislatures are often subservient to the dictates of party expediency. This was of course peculiarly the case in the United States senatorial elections, but the elections of state officers are also occasionally used for the specific advantage of the party organization. Thus for instance in Maryland the recent practice has been to elect as state treasurer, the chairman of the Democratic State Central Committee. He is thus enabled, through the control of the deposit of state funds, to assist the organization materially.

The power of appointment which the governor has in respect to some inferior officers and some of the state commissions is in many commonwealths made subject to confirmation by the Senate. It has been held in Michigan<sup>1</sup> that the Senate has the power to

<sup>1</sup> *Dust v. Oakman*, 86 N. W., 151.

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withdraw its consent to an appointment to office; since in concurring in such appointment it exercises a legislative function, revocable under ordinary parliamentary rules, and not a quasi-executive duty, incapable of revocation. It must, however, be remarked that courts have usually held the exercise of the appointive power to be an executive function. Thus it has been decided in diametrical opposition to the above case, that it is not necessary, in a call for an extra session of the legislature, to mention the confirmation of appointments to be made, because the limitation upon extra sessions applies only to acts of legislation.<sup>1</sup>

The question as to the nature of the appointing power and as to the proper location of its exercise has received considerable attention on the part of the courts. Thus it has been decided that the exercise of the appointing power by Congress is precluded by the fact that the Constitution vests it in the Executive part of the Government.<sup>2</sup> The Supreme Courts of Indiana and of Illinois have been especially strict in their adherence to the principle of the separation of the three departments. The constitutions of these states distinctly provide that no officer shall exercise the functions of any other department than that to which he belongs. The Indiana Court has repeatedly held that a legislature in prescribing by law how appointments are to be made cannot vest in itself the election of a state officer, nor can it make appoint-

<sup>1</sup> *People v. Blanding*, 63 Cal., 333.

<sup>2</sup> *Wood v. United States*, 15 Court of Claims, 151.

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ments directly.<sup>1</sup> Nevertheless this Court also decided that as the legislature had frequently and uniformly assumed control over the appointment of officers of the state charitable institutions—a control which had been acquiesced in by all departments of the government—the legislative appointment of a trustee of such an institution would be held valid.<sup>2</sup> In Kentucky the legislature in 1898 attempted to secure control of the entire electoral machinery by creating a State Board of Election Commissioners, appointed by itself. The Supreme Court has, however, declared this act unconstitutional on the ground that it delegated executive duties to the legislature,<sup>3</sup> although it had previously sustained the act against the contention that the exercise of the appointive function by the legislature impaired its validity.

The constitution of Ohio provides that "no appointing power shall be exercised by the General Assembly, except as prescribed in this constitution and in the election of United States senators." The practice had grown up among members of the Ohio legislature to barter votes for offices in exchange for votes for laws. To remedy this, the Constitutional Convention of 1851 was called. In this convention the purpose of the clause above was stated as being "that no appointing power—not the least vestige—should be left to the General Assembly." Among the most

<sup>1</sup> *State v. Denny*, 118 Ind., 382. *State v. Peelle*, 121 Ind., 495. See also, for a similar principle, *Taylor v. Stephenson*, 2 Idaho, 166, and *Rathbone v. Wirth*, 150 N. Y., 459.

<sup>2</sup> *Hovey v. State*, 119 Ind., 386.

<sup>3</sup> *Pratt v. Breckinridge*, 65 S. W., 136.

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prominent reasons urged and advocated for the adoption of the new constitution was the forbidding of the legislative power of appointment. In April, 1858, the legislature passed a state house and a penitentiary act which provided "that there shall be appointed by William Kennon, Asahel Medbury and William B. Caldwell, or a majority of them, three directors of the Ohio penitentiary," etc. The state house act contained a similar provision. In *State v. Kennon* (7 Ohio St., 546), the Supreme Court held these acts to be legislative evasions and unconstitutional, for the power to direct the manner of appointment did not include the power of naming an appointing board in defiance of the constitutional provision. In jurisdictions where this limitation is placed upon the legislative power, it has, however, been held that the legislature may confer additional duties and functions upon officers already chosen. Thus it may pass an act providing that the commissioners of highways in a town shall also be drainage commissioners,<sup>1</sup> or that the chief of engineers in the United States Army and the engineering commissioner of the District of Columbia shall be members of a Park Commission in the District.<sup>2</sup>

In a number of states it has been held that the power of appointment to office is not exclusively an executive function, but, as far as it is not regulated by express provisions of the constitution, it may be controlled by statutory law or even directly exercised

<sup>1</sup> *Kilgour v. Drainage Commissioners*, 111 Ill., 342.

<sup>2</sup> *Shoemaker v. United States*, 142 U. S., 282. See also *Walker v. Cincinnati*, 21 Ohio S., 14.

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by the legislature itself.<sup>1</sup> In Maryland it was held that the appointment of city police is not exclusively an executive act which the legislature cannot perform<sup>2</sup>; and in Kentucky, the election law of 1898 providing for appointment by the legislature of the State Board of Election Commissioners is not unconstitutional for that particular reason.<sup>3</sup>

<sup>1</sup> *Travellers' Insurance Company v. Oswego*, 59 Fed. R., 58 (Kansas). *People v. Freeman*, 80 Cal., 233. *Commissioner v. George*, 20 Ky. Law Reporter, 938.

<sup>2</sup> *Baltimore v. State*, 50 Md., 376.

<sup>3</sup> *Purnell v. Mann*, 48 S. W., 407. See above, p. 225.

## CHAPTER VIII

### THE PERVERSION OF LEGISLATIVE ACTION

IN American practical politics, constitutional requirements are often treated with scant courtesy; indeed, the institutions and principles of the public law have in some instances been effectually superseded by an extra-constitutional system of political influences based on economic or financial power. Economic interests as such are not accorded representation in our political system, which is founded theoretically on the representation of numbers, for the ascertaining of the general will and the consummation of the common welfare. So great is the prejudice against persons connected with important economic enterprises that, no matter how excellent their qualities of character may be, they are considered unpromising candidates for public office on a party ticket. But by a curious inversion these very interests which are in theory excluded from a direct influence upon our democratic institutions, have in practice in many commonwealths acquired an absolute control of political action. Indeed, by force of circumstances there has been evolved a system of representation of interests, in which unfortunately the general interest of

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the state does not always hold its own. For the interests represented are special, being composed of powerful economic combinations which use the political machinery of republican institutions for the purpose of procuring exemptions and privileges which serve still further to augment and to entrench their preponderance. Thus it has come about that the very institutions which are founded on the idea of a common welfare, developed and protected by the action of the general will, have in many cases been made the instruments for the creation of a régime of special privilege. This is due to the simple fact that while people in general are busily pursuing their own private affairs, the public interest is allowed to fall into the hands of men who see in it simply the source of private advantage and who are ready to permit their political action to be controlled by whatever interest or group is most liberal in its treatment of the practical politician.

When our government was founded the statesmen of the day were animated by the living traditions of English politics. These traditions indeed did not exclude the practice of corruption—we need only remember what eighteenth century Whigism stood for in practical politics—but there was after all among these men a strong sense of “commonwealth,” of the public interest, and an honest ambition to do a substantial service to their state and country. With the incoming of the democratic régime, there was added to these traditions the general welfare theory of Rousseau and of Bentham as interpreted by Thomas Jefferson. For a time this idea had actual

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force and inspired statesmen to unselfish and public-spirited action. Nor were the interests of the country at that time so diversified as to make it difficult to remain within the Constitution and within the general welfare theory in adjusting the claims of the various component parts of the state.

But as the economic development of the country advanced and the unprecedented opportunities for gaining economic power were recognized, the men of high ability were more attracted to the fields of industrial enterprise, and human material of a relatively inferior grade began to people the political positions, especially in the state legislatures. The impetus given to these economic tendencies by the Civil War led to an era of unrestrained individualism. In the intense struggle for opportunities and privileges men were animated, as in that other great individualistic age, the Renaissance, by the sole consideration of personal success. Public rights and general welfare were ignored and often practically treated as non-existent.

The opportunities which our political system offered for the rapid extension and solid entrenchment of economic power were soon perceived by the shrewd leaders in this struggle. These men noticed that while every one was anxious to acquire wealth, nobody paid any attention to the institutions through which unlimited economic power could be acquired—the state legislatures. Whoever should interest himself in these bodies and pay his respects to the neglected statesmen of the commonwealths, they saw, would be amply rewarded. The great railways, having most to gain

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were the first to perceive the opportunity. In these earlier days things were often managed with little adroitness. There was much indiscriminate and broadcast bribery; to buy men for a moderate amount per vote was the acme of ambition to the successful lobbyist. Such unskilful and clumsy methods of corruption were easily discovered and, though they served their purposes over and over again, at times brought discomfiture to their originators. In Pennsylvania, disgust with wholesale corruption led to the calling of a Constitutional Convention in 1872, which gave the whole matter of legislative organization and procedure the most careful consideration and framed excellent constitutional enactments. Unfortunately many of the latter were afterwards politely ignored or less considerately brushed aside by the all-efficient "unanimous consent" under machine rule. The investigation of the scandal of the Milwaukee and La Crosse Railway Company in Wisconsin (1858), showed that about \$900,000 worth of bonds had been distributed among legislators and prominent politicians in the state. Conditions like these have probably obtained in all the states at some time or other. They still exist in some localities, but in most of the states the special interests have developed a far more efficient system of dealing with legislatures than hazard corruption.

As a natural outcome of the competition between powerful corporations for legislative favor, there was developed gradually a hierarchy of interests, or some specially powerful interest became controlling and made the other seekers for privileges its vassals. As

the railways, on account of the extent of their business and their quasi-public character, had most to gain or lose through legislative action, they naturally strove for the primacy of influence, and early in the history of corruption in many commonwealths made good their claim to a controlling position. Though nearly all seem to have been willing to enter the race for power, the most flagrant instances of wholesale and systematic corruption are found among those corporations, whose plans embraced the conquest of a number of commonwealths. During the formative period when new grants, privileges, and exemptions were sought by the railways, and when their legal status still largely remained to be determined, the influence of this particular interest became so pervading that we may indeed speak of the railway period in our legislative history. When in certain commonwealths the railways had secured all the franchises, exemptions, and privileges which the legislature could bestow upon them, and when they had given a form to these "incidents" which could be relied upon as fairly permanent, the railways began to take a somewhat less direct interest in polities, confining their activity principally to the prevention of unfavorable legislation. Indeed, in some instances they felt able to dispense with the finely wrought and efficient mechanism which they had constructed; this they now hired out to some other "interest" which had not as yet sufficiently fortified its position. We thus enter upon the public utility or public service period of legislative corruption. The "trolley crowd" and the "gas combine" became potent factors in legislative

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life. As they desired to use the public highways, their need for political support was especially strong. Interurban electric railways had to get the whip-hand over refractory town councils, and corporations of this kind needed long term franchises to make their stock and bonds readily salable. The manufacture of electricity being a connecting link between "trolley" and "light," they often worked hand in hand, or formed one great "public service corporation." The incidental irony of this name, it would seem, is fully appreciated by the men who use it. An understanding of the later developments will make it clear that it is impossible to dissociate municipal administration from the affairs in the state legislature, until a complete system of municipal home rule has been developed. Municipal government thus acquires an importance far transcending the limits of local affairs; through the uses to which it may be put by powerful combinations, it becomes a matter of central moment in American public life.

The age of competition is everywhere giving way to an era of solidarity. Originally the lobby consisted of independent adventurers struggling to obtain for their clients legislative favors. Later, groups were formed corresponding to the various interests represented, which were still vigorously competing with each other. A higher form of solidarity is reached when one interest has obtained the unquestioned ascendancy so that it enjoys the power to restrict other groups within a limited sphere, and to harmonize their conflicting interests by imposing a spirit of compromise upon them. Of course no in-

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terest, however powerful, needs all the attention of the legislature for its own affairs. The idea, therefore, occurred to the representatives of the leading interest that as they required only a portion of the legislative energy for their own purposes, it might be profitable and advantageous to dispose of the by-product of legislation to such lesser interests as were able to return a proper consideration. The claims of lesser men could thus be dealt with upon the basis of commercial justice. This tendency toward mutual adjustment has constantly grown and the lobby has been organized in many instances as a complete hierarchy. The controlling interest, whether railway, trolley, or gas, is willing to allow a fair share in legislative influence to be enjoyed by others. This is commercial government in its perfection, where in the words of a "square boss," "Any business man can get what he needs at a reasonable price."

As a result of the developments briefly reviewed, direct money bribery has perhaps become less common than it was in the simpler days. When the great interests own the legislature or a controlling part of it, it is of course not necessary for them to buy support on individual measures by pecuniary bribes.<sup>1</sup> It is well known that the control exercised is often an indirect one, reaching the individual legislator through some person who may be said to be his political owner. Cases are, in fact, not infrequent

<sup>1</sup> The former is from the point of view of the "interests" altogether the most satisfactory method, for, as an elder "statesman" sadly (and blasphemously) remarked, the men you have bought "won't stay bought."

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where legislators seem unaware of the fact that they are owned, and their protestations of public virtue must have a peculiarly exhilarating sound to the ears of the actual proprietors. The lobby organized under the most advanced system often becomes a third chamber, a senate, or an advisory council in states where an autocratic boss exists. The representation of interests, ruled out by our constitutional theory, has become a fact in many state legislatures. Nor are the lobbyists ordinarily men of mean ability or criminal character. They are indeed often of considerable mental capacity and they generally have far more experience of legislative action than the average member. The boss and lobby work in common with the group within the legislative body which is favorable to the powerful interests thus represented. It is of course not necessary for these interests to own even a majority of the legislators; a smaller group, comprising members of both parties, well organized and backed by the ability and influence of the lobby, is in ordinary times sufficient to maintain a safe control of legislative action.

Under this system great powers have to be placed in the hands of some trusted person; moneys have to be received and expended, although not in the indiscriminate fashion formerly employed; men have to be wheedled or threatened; the execution of the laws has to be delayed and pardons secured; persons of all sorts have to be induced to work in harmony and with expedition; and all these activities have to be carried on without publicity, without open consultations. A great amount of trust thus has to be

put in certain managing individuals. Great adroitness and tact, cool calculation, quick decision, ability to coerce men without unduly hurting their feelings—all these are needed for successful leadership. Triumvirates are often formed where a supreme genius has not appeared or where he has left the stage. But the universal tendency is toward greater concentration, and sooner or later there is evolved the boss, the fruit and flower of commercial politics in America. He represents the main interest but also holds the balance between the minor tributary groups. The secrecy necessary for his work gives him great power. He alone holds all the threads that bind the system together. In his person are united the confidence of the favored interests and the hopes of his political lieutenants. He commands the source of supplies. He has mastered the study of political psychology and knows by intimate experience the personal character of the prominent politicians in the state. Most of them are dependent upon him for future favors or are bound to him through past indiscretions. The character of the system demands an absolute ruler. For this reason, too, the power of the boss is continuous; it is rarely overthrown from within and only a great public upheaval can affect it. Bosses maintain themselves in the saddle and enjoy a long lease of power, because of their direct and confidential relations with the controlling interests; their inborn secretiveness leads them to keep their own counsel, and not to allow any other person a complete insight into all the intricacies of the system. They grow stronger as the years pass and no indis-

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cretion or even crime is able to shake their authority while they keep in their hands the main threads connecting influence with its obedient tools. The abler men of this type are filled with a keen sense of the irony of their position. They have the clear insight into the coarser actualities of politics that characterized Machiavelli. The political exhorter who sways the multitudes from the stump does not become a boss; to achieve that position the power of cool analysis, of impassive control, and of unflinching execution, are more essential than any gifts of popular leadership.

We are thus brought face to face, in our political life, with the growth of a compact system outside of the constitution and the public law. The legal forms are given at most an empty observance: there are nominating conventions, but the candidates are dictated; there are elections, but the registry and the returns are fraudulent. There is perhaps at present more direct bribery at elections than in the legislatures, especially in states where peculiar conditions of suffrage exist, particularly in Maryland, Connecticut, and Rhode Island. In the legislature the groups representing the industrial system have the power of organization on their side. They have been able again and again, and for whole sessions at a time, to turn parliamentary procedure into a mere formality for impressing the character of law upon the dictates of the special interests. An artificial common consent is easily created by which all constitutional limitations upon parliamentary practice can be summarily evaded. The real power in such cases is usually behind the throne. We hear of a potent boss

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dictating amendments from behind a curtain that shields him from view, but enables him to follow minutely the proceedings of the legislature. The influence of party affiliations is used at the convenience of the controlling power to whip into line the doubtful members by a threat of the charge of party disloyalty. But ordinarily the organization is non-partisan or bi-partisan in its character, having its representatives on both sides of the house. In this manner its power ceases to be conditional upon fairly unanimous party support, and it can afford to ignore a large minority of independent spirited members of the ruling party.

The same disregard for constitutional requirements and for the demands of public policy which manifests itself in the method of legislative shortcuts, extends to the substance of legislation. Any institutional arrangement, however well established, will be capriciously and tyrannically modified whenever the temporary needs of the organization demand it. This "ripping" of public institutions is one of the most striking characteristics of the commercial system of politics.<sup>1</sup> Whether the governor alone or in conjunction with the Senate shall exercise the power of appointment, whether the veto power is to be accorded to mayors, whether the aldermen or the legislature shall control franchises, whether the police is to be under the municipal governments or under a state board; all these questions are settled solely according to the needs of the organization in fastening its control alike upon local and state governments.

<sup>1</sup> See below, p. 266.

*The bosses &  
corporations  
make the  
power  
standards*

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Should it be unable to fill the position of mayor with its nominee, it will destroy the powers of that position. Should the voters of a particular city become refractory, the administration of municipal functions will be transferred to a state board. Indeed the boss and the controlling interest, like the king, can do no wrong, because whenever any law stands in their way it can be changed by them to suit the present purpose. They not only hold the actual power, but, should their position be threatened, they can shift the institutional basis of authority at their will as the exigency of the moment may require.

*The machine  
rule the  
excuse  
out of  
the officials  
legislature  
etc. is  
not a house  
without  
a chimney*

If the sanctity and permanence of law receives no consideration in the mind of these rulers, no more is given to the human material consumed in achieving their purposes. Their servants are indeed paid liberally in money and preferment, but they are reduced to a position of dependence in which the soul is burnt to ashes. The cynicism of the political boss and his satellites and the temptations which they hold out, are the greatest corruptors of youth in our age. The young graduate beginning his professional life finds the industrial and commercial world far more intricate than he had anticipated. His knowledge seems insignificant, he lacks experience, the world seems apathetic, and the mastery of its elaborate processes and methods well nigh unobtainable. When at this time the representative of a controlling interest, who usually has a good eye for striking promise of ability, approaches the young lawyer, retains his services, and opens up the way to preferment, he is working with a great advantage; and there are few

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men who will under such circumstances have foresight enough to fathom what will ultimately be required of them by their new friends. By blocking the road of legitimate ambition, the men that have been enlisted are then gradually forced to make themselves the passive tools of their employers. The system is in need of able representatives and of mediocre legislators. It will therefore do its best to impede the advance of public-spirited and independent men in political life. It is not surprising that politics does not in general offer a satisfying career. Able men of high character are disgusted with the usual demands made upon politicians. While youth is corrupted, manhood is tyrannized; and wherever the commercial system has been most successful, property, honor, and even life have been rendered unsafe. We do not here refer solely to the scandalous viciousness of the metropolitan police, but to direct and implied threats against the life and property of men for the purpose of cowing them and making them entirely dependent upon the pleasure of the political despot.<sup>1</sup>

The organization which we have briefly described in its methods and results exists in various degrees of perfection. Some of the states are indeed comparatively free from it. They have either maintained

<sup>1</sup> See examples brought out by R. Blankenburg in "Masters and Rulers of the Freemen of Pennsylvania," in "The Arena," 1905; a moderate and responsible, though indignant, account of Pennsylvania's politics. Also Lincoln Steffens's "The Struggle for Self-Government," 1906. C. P. Connolly, "The Story of Montana" in "McClure's," 1906.

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a fairly honest character in their political life, or they still live in the Arcadian simplicity of the first period of indiscriminate corruption. In some of the commonwealths, on the other hand, in which the organization has been perfected, it is from time to time threatened by great popular movements in opposition to it and forced to suspend operations for a time. But in the words of a once famous railway and insurance senator, "Such storms blow over," at ordinary times, and the political boss, emerging from his cyclone cellar, soon succeeds in "repairing his fences." So indeed even the present storm of popular indignation also may blow over, unless the real nature of the situation is clearly perceived by the people. They must learn to understand that the combat is not so much against individual wickedness and corruption as against a system of extra-legal and extra-constitutional despotism, which rules with the absolutism and narrowness of aim and sympathy ordinarily attributed to Czardom.

When a legislative group is organized under the supervision of a boss for the purpose of carrying on the government in accordance with the needs of special interests, the party machinery is made use of as much as possible for the purposes of whipping into line doubtful or independent members. The group must, indeed, control a majority of the party in power so as to be able to nominate the legislative officers and committees. But the organization leaders can afford to ignore the minority members in the governing party because they will ordinarily be able to draw on the party of opposition for sufficient support to carry

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their measures. This in fact is the favorite arrangement. Parties are after all public institutions whose work has to be carried on more or less in the open. Were the organization to rely solely upon the dominant party the independent members would constantly be a thorn in the flesh. The party in its character as a public body would be loath to assume the responsibility for the legislative work demanded by the system. The control of a strong group within the dominant party will ordinarily be a sufficient basis for the power of the organization, as there will usually be a corresponding group in the minority party, who will be ready to associate themselves with the system in return for a share of legislative influence. The most efficient legislative machines have therefore always been more or less bi-partisan in character, and have used the name of the dominant party only to blind the public as to their real purposes. In the evil days of the Illinois legislature from 1897 to 1903, the Senate combine consisted of a strong group of experienced Republican senators closely affiliated with a lesser group among the Democrats. Only one Republican Senate caucus was held during the session of 1903, that on the convict labor bill, upon which disagreement was a foregone conclusion. All the business of the Senate was managed by a steering committee consisting of five organization senators. In the arrangement of committees far more positions were given to the Democratic senators than to the members of the Republican minority, although the latter were equally as numerous as the Democrats.

For the management of the House, the organiza-

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tion relies primarily upon the power of the speaker. He appoints and controls the committees, and through the steering committee or the Committee on Rules often exercises a complete mastery over the course of business. His power is ordinarily proportionate to the influence of the organization, and in extreme cases, he may be confident enough to "gavel through" the organization bills by using the fiction of common consent. The system favors the democratic principle of rotation in office for the Lower House. If the members are new and inexperienced and of moderate ability the task of organizing them into groups favorable to the associated interests will be comparatively easy. The effort is made to draw the holdover or re-elected members into the organization by offering great inducements, and thus to secure a monopoly of all legislative experience within the House. There has been quite a remarkable shortening of the average term of service in some commonwealths. In Connecticut, at the beginning of the nineteenth century more than one-half the members were ordinarily re-elected, now, the return of an old member has become an exception. In 1900, only 43 among the 255 members were men who had served in the House before.

The creation of a bi-partisan combine is facilitated in states where one of the parties is in a constant and almost hopeless minority. The safest chance its members have for exercising legislative influence is through an alliance with the organization forces within the dominant party. If the dominant party were to act as a responsible public body, it would as

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much as possible ignore the party in opposition; but as the really controlling force is a bi-partisan organization of commercial government, those who are ignored are the independent spirited members of both parties—that is, all who do not effect a compromise with the governing power. The Missouri bi-partisan Senate group, as it existed until recently, is an example of the worst kind of this type of organization. The organization in Missouri had the distinction of combining the most highly developed system of control with the most brazen methods of wholesale money corruption. The same bi-partisanship has prevailed in Pennsylvania. The Democratic machine in that state has, in fact, often been a mere annex to the governing organization. The character of the mutual support is illustrated by the election of magistrates in 1905. The law gives the minority a certain representation on the bench. In this election there was reason to believe that the Republican opposition would poll enough votes to elect their candidates for these minority positions. The Republican machine thereupon lent a number of its corrupt voters to the Democratic managers, thereby enabling them to elect their nominees. The cumulative system of voting has proved itself exceedingly favorable to such manipulation. The machine of the dominant party will invariably help elect the representatives of the opposition if they promise subserviency to its main purposes. The state of New Jersey offers many striking illustrations of bi-partisan rule. The Republican gerrymander of 1881, resulting in the election of a Republican legislature while the Democratic majority of the

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people elected the governor, laid the foundation for this system. In Rhode Island a Democratic politician was for a time allowed to act as leader of the Republican Senate. Of course the organization leaders are loud in their protestations of party loyalty, but they are strangers to any idea of consistent party action and of party responsibility for the general welfare. Their power is, in fact, conditioned upon making such action impossible and carrying on ordinary legislation by deals between members of both parties.

This bi-partisan character of machine methods is prominent also in municipal affairs. Where big cities are tangled up with a county organization, it is a favorite arrangement to allow one party to control the county, the other the city. Bi-partisan boards like the old New York Police Board are dear to the politician's heart, because under them government through deals is a natural result. In some states there exist peculiar organizations due to local conditions. The Connecticut legislature has its Farmers' Association, which meets practically every morning during the session and debates the questions at issue, and the decisions there arrived at are registered by the General Assembly. The Empire State embraces within its realm so many powerful interests, and the parties within it are so evenly balanced, that there has not been a constant dictatorship by one bi-partisan boss, but rather the bosses of the two great parties have governed the state by making mutual arrangements. The New York Senate has, however, had organized groups as bold and corrupt as any, although

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their power is not always absolute; the activities of the "Black Horse Cavalry" in corrupt legislation are sufficiently notorious. The bosses of New York, on account of the nearly equal balance of parties in that state, are in a position to use the cry of party loyalty to great advantage for their own purposes. They therefore make more use of it than is ordinarily the practice of the "organization." When the intimates of a boss pass the word that a bill is a party measure, obedience is ordinarily quite general, although no one has any knowledge of what forces are back of a measure upon which even the legislative leaders may, in fact, never have been consulted at all.

The influence which is brought to bear by the leaders of the organization in order to control individual members is exceedingly varied and always adapted to the conditions of the particular case. The organization can, to begin with, count on the legitimate influence which justly belongs to the strong interests which it represents. But as these interests almost invariably desire more privileges than they are entitled to upon an impartial basis of general welfare, and as the politicians with whom they have associated themselves are moreover ambitious for complete control, they simply use such legitimate influence as a nucleus about which to construct a powerful system of government. The most effective weapon in the hands of the organization, when it confronts men of independent spirit and good character, is the warning that their usefulness will be destroyed, unless they ally themselves with the strong interests. The leaders urge with truth that legislation is a matter of

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compromise, that you cannot expect to put your measures through singlehandedly; and they offer their influence in return for a member's vote. If he continues refractory they ignore or oppose him, and he finds it exceedingly difficult to procure a hearing for his bills. Moreover, he will receive very scant credit for his active and vigilant attention to the interests of the public. When he has headed off one corrupt measure, twenty will spring up to take its place. Unless a man of extraordinary character and ability, he is generally forced by the very insistence of his constituents to make some kind of a compromise in order to "restore his usefulness."

Where the system through its influence with hold-over members has gained control of the House organization, its power to assign members to committees gives it abundant means of enticement, and many men mortgage their legislative independence at the very beginning of the session for the empty honor of being placed on a prominent committee. The appointment of committees is often delayed for weeks and months, in order to give the organization an opportunity to test its material before grouping it for actual business. During the early part of the session, patronage is also used for the purpose of enlisting recruits for the machine, in states where the patronage is not equally divided per capita. The methods of indirect bribery are numberless. A corporation which has heavily subscribed to the campaign expenses of a legislator, feels entitled to his vote whenever its interests are involved. There are many favors at the disposal of powerful corporations

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which do not come under the statute of bribery, but which serve the same purpose. Employment given to the relatives of a member,<sup>1</sup> opportunity to purchase at favorable rates stock and other property, rebates on transportation charges, and free passes, are favored and common methods. Though the giving of passes was forbidden by the constitution of Pennsylvania, yet they were for a long time freely distributed as there was no legislation to enforce the constitutional prohibition. The connection of legislators with the stock market is often very close and most corrupting in its influence. In Illinois, the gas combination bill of 1897 was deliberately juggled, authoritative reports with respect to its progress in committee being given out from time to time in order to enable members to take advantage of the consequent fluctuations in the market price. In 1905, the notorious "Ten" carried through a scheme in the New York Senate, by which the Chicago and Eastern Illinois Railway bonds were to be included in the savings bank bill as proper securities for investment. The "Black Horse Cavalry" had succeeded in a similar deal formerly, and members had made a large profit on the consequent appreciation of the bonds in question. A favorite method by which lobbyists transfer money to legislators is through a friendly

<sup>1</sup>Joint rule No. 30 of the Massachusetts legislature provides as follows: "A member of either branch who directly or indirectly solicits for himself or others any position or office within the gift or control of a . . . public-service corporation, shall be subject to suspension therefor, or to such other penalty as the branch of which he is a member may see fit to impose." (Adopted May 22, 1902.)

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game of poker. Even though no direct arrangement has been made with the legislator this method proves very efficient, as a man who continually allows himself to be beaten at poker is a valuable friend indeed to the needy legislator. This manner of payment has the great advantage of being perfectly safe before the law and at the same time so notorious that a legislator who has been allowed to win large sums of money, would hardly dare to go back upon his lobbyist friends when the critical vote comes up.

But it is not always necessary that means be resorted to which involve offices or money considerations. The inexperienced legislator without money or friends becomes acquainted with some tactful lobbyist; through him he is introduced to influential members and also, if he desires, to the social life of the capital. He is given assistance in preparing his bills, material is collected for him when he wishes to make a speech, or to favor or oppose some measure in committee. Thus difficulties are smoothed over, information supplied, and social pleasures made accessible by a cordial friend who never mentions legislative business. Should, towards the end of the session, this friend casually remark, "By the way, bill No. 212 comes up to-day. It's a good bill and I want to see it pass. I hope you will give me your assistance"; there are few members that have gone thus far who will refuse this request, and the purpose of the lobbyist has been accomplished. It has been common for prominent corporations to have headquarters in the capital city at some house where open hospitality is dispensed. In the New York insurance

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investigation it came out that the New York Life in ten years paid out \$1,117,697 for "the supervision of matters of legislation." This sum was paid without adequate vouchers to one man to be used by him at his discretion. The results of the investigation are summarized by the committee in the following language:<sup>1</sup> "Nothing disclosed by the investigation deserves more serious attention than the systematic efforts of the large insurance companies to control a large part of the legislation of the state. They have been organized into an offensive and defensive alliance to procure or to prevent the passage of laws affecting not only insurance, but a great variety of important interests to which, through subsidiary companies or through the connections of their officers, they have become related. Their operations have extended beyond the state and the country has been divided into districts so that each company might perform conveniently its share of the work. Enormous sums have been expended in a surreptitious manner. Irregular accounts have been kept to conceal the payments for which proper vouchers have not been required. This course of conduct has created a widespread conviction that large portions of this money have been dishonestly used. . . .

"The large insurance companies systematically attempted to control legislation in this and other states which could affect their interests directly or indirectly. . . . The three companies divided the country, outside of New York and a few other states,

<sup>1</sup> Report of the Committee, New York Assembly Document No. 41, 1906, pp. 394 *et seq.* and p. 19.

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so as to avoid a waste of effort, each looking after legislation in its chosen district and bearing its appropriate part of the total expense. . . .

"It has been insisted that the insurance companies have been so continuously menaced by the introduction of improper and ill-advised legislative measures in many states that they have been compelled to maintain a constant watchfulness and to resort to secret means to defeat them. An insurance corporation, however, holds a position of peculiar advantage in opposing any legislative measure which really antagonizes the interests of policy-holders. . . .

"The pernicious activities of corporate agents in matters of legislation demand that the present freedom of lobbying should be restricted. They have brought suspicion upon important proceedings of the Legislature, and have exposed its members to consequent assault. The Legislature owes it to itself, so far as possible, to stop the practice of the lavish expenditure of moneys ostensibly for services in connection with the support of or opposition to bills, and generally believed to be used for corrupt purposes. . . ."

The president of a large insurance company indignantly denied any attempt at bribing legislators. He however admitted that the representatives of the company had "seen" persons who were known to have influence over the legislators. This indirect approach of legislators through their political godfathers is very common indeed. In the words of a representative of a prominent corporation, "I let others waste their money buying legislators. I go to

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the man who owns them. He does the work." The owners of a legislator are not generally politicians. They are frequently business men on whom the legislator is financially dependent, or who have power to advance him in his calling or profession. The advice given by such persons is usually followed, and in many cases the legislator is not aware that his action is being manipulated.

When the work of reform is systematically undertaken, the reform forces, through the votes which they control, can wield a powerful influence even over corrupt groups. Thus in 1903 when the citizens of Chicago demanded just traction legislation, the Senate combine recognized that something had to be done. Accordingly after some juggling they passed the Mueller bill, which caused the wreck of the speaker's organization in the House. In Connecticut in 1905, to the infinite surprise of everybody, a strong corrupt practices act was passed in the face of opposition from the bosses. The reformers were helped by the fact that the ordinary politicians recognized that there was some force back of the reform movement, and also that politics had become so expensive a game that it could be played only by the very rich. Even the organization people are coming to admit that a determined group of reformers must be listened to; and though the practical politicians still have a vast amount of contempt for the reformer, they have been forced to familiarize themselves with the idea that there is such a thing as a public interest which some men will actually work for without any pecuniary return to themselves. But the idea that all legislation

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should be dealt with on this basis is still far from having a common acceptance. When, in 1905, the Chicago Board of Trade desired the passage of a bill legalizing certain trade transactions, it decided to refrain from all attempts at corrupt influence; but a certain element in the legislature prevented the passing of this measure. "Reform methods," "lily-white lobbying," were said to be inappropriate to a bill which might be desirable for the Board of Trade, but for which no public propaganda could be made; for though in no sense a corrupt measure, it was not one in which the people in general would be interested. A new distinction was thus evolved. The legislator will listen to a reformer with a strong voting constituency. But the man who simply asks for a measure to render his business safer or who wishes the law with regard to it to be more settled, will be called upon for some *quid pro quo* by the corrupt element.

It is often stated that the industrial and commercial interests are forced to the adoption of corrupt methods for the purpose of self protection against unreasonable legislation or of securing such laws as are necessary to the proper prosecution of their business. The president of a New York insurance company declared that eighty per cent. of all legislative bills referring to insurance are "hold-up" measures, and similar statements have been made again and again to defend the practice of corruption. It is indeed unhappily a fact that the kind of bill known as a "strike" is of exceedingly common occurrence. Other designations for it are "hold-up bill,"

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"sandbagger," "fletcher," "old friend," "bell-ringer" and "regulator." This last designation refers to the assumed purpose of this class of measures to regulate the business of corporations. There is usually no real intention to enact them, but the organization holds them in reserve in order to punish some refractory interest or to make its power felt by the corporations. Often individual freebooters engage in this kind of business, in the hope that through the inadvertence of other members and through log-rolling they may advance such a measure to a position where it will render the interest affected nervous and ready to come to some arrangement with the originator of the bill. But this individual freebooting cannot be very successful unless it is carried on with the assistance of some organization. In some legislatures the first months of the session, aside from unimportant local legislation, have been given almost entirely to the manipulation of "regulators" and the securing for them of a good strategical position on the calendar of either house. While the organization is thus occupied, really important public legislation is allowed to lie over till the rush of the last days begins. But to argue that the existence of these conditions forces the corporations, and especially the stronger interests, into legislative corruption is certainly not convincing. It is conceivable that a smaller corporation may be forced to buy immunity in individual cases, but the more powerful interests which exercise the real control must certainly know that money spent to avoid vicious legislation is worse than wasted, since the appetite grows

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by what it feeds on. From a study of the legislative action of the great industrial interests it is apparent that they often do not go into the legislatures primarily for the purpose of self-defense, but on account of a desire to gain undue privileges denied to others, and to resist legislation which the real interests of the public demand. Thus the insurance companies opposed legislation to compel them to put the entire contract into the policy, or forbidding them to allege that their paid employees are also the agents of the insured. The manner in which the transportation interests have resisted the enactment of laws demanded by public policy and by ordinary regard for human life, and have constantly pressed for special privileges and exemptions, is notorious. If their only purpose were self-defense, they would attempt to ally themselves with the honest legislators and keep them honest: that would be their best protection. But instead of this, it is the almost invariable practice of their representatives to associate with the corrupt elements and to use every device ingenuity can suggest to render honest men corrupt.

At the meeting of the legislative session of 1905 in Missouri, Governor Folk promulgated certain rules for the lobby. Lobbyists were required to register every time they came to the capital, stating accurately the business which brought them and specifying the measures they desired to favor or oppose. They were not allowed to stay more than thirty hours at a time in Jefferson City. In return for a faithful observance of these rules the governor promised the special interests that he would not allow any "hold-

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up" measure to pass, an agreement which he kept by vetoing several bills which might fairly be suspected of that purpose. As a rod to compel obedience he held over the heads of the lobbyists the threat of an investigation. The governor of Kansas ridded the legislature of the entire Standard Oil lobby during the controversy of 1905, by threatening an investigation and getting the grand jury ready for business.

When the legislative houses have been organized in accordance with the desires of the system, it is then not difficult for the latter to control the entire course of legislation. The business can be so arranged that discussion of important matters is delayed until the larger part of the session has passed and members become anxious to return home. It is then an easy matter liberally to suspend the rules and to rush through the measures agreed upon by the organization. During the first three months of 1903, the sessions of the Illinois Senate occupied altogether thirty-six hours, twenty-one of the sessions being of less than fifteen minutes' duration. During these thirty-six hours 456 bills were introduced and 120 passed, all the important measures being held back to be crowded upon the calendar during the closing days of the session. During one of these sessions lasting four hours (April 24), outside of the receiving of reports and the discussion of the civil service bill, there were passed thirty-six bills, including some of the most important appropriation measures, none of which were either explained or discussed. During the same session, the omnibus bill, carrying appro-

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priations to the amount of \$3,700,000, was read only by title and passed without a word of discussion.<sup>1</sup>

Though we have become fairly well reconciled to the idea that an adequate discussion of public measures cannot be had upon the floor of a legislative body, it is usually supposed that at least in the committees the merits of the various bills are carefully considered. But not even this is the case in legislatures where the organization is strong. There the committee is looked upon solely as an instrument for effecting the purposes of the organization. Large committees are favored by the system because they can be controlled through a select ring by the use of sub-committees; the majority of the members are kept in the dark and the formal meetings simply give opportunity to the chairman to get a vote on the measures desired by the organization. In states where such conditions prevail the time of committee meetings is never sufficiently announced. Meetings are called at the pleasure of the chairman and at a time most suitable for his particular schemes. It is indeed quite necessary that all states should adopt and enforce legislation like that of Massachusetts, which requires sufficient notice of all committee meetings. Under prevailing conditions, not only interested outsiders but members of the committee itself often find it impossible to learn what is actually being done in the name of the committee, and what forces are work-

<sup>1</sup>F. W. Parker, "A State Legislature Seen from Within," "Christendom," 1903; a series of articles by a state senator, giving an excellent insight into legislative procedure.

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ing for the measures that are being advanced. If it is the purpose of the political managers not to allow a certain committee to exercise a prominent influence the chairman will not issue a call for a meeting, or he will fix some inconvenient time when no quorum can be secured. If he has the backing of the organization, there is no check whatever on his action. He may declare measures passed by the committee and report on them, though they have actually never received consideration or been assented to. On the other hand an unwelcome measure passed by the majority may be carried about by him indefinitely, and he may find it inconvenient to report on it at all. As in general it is unwise to stir up bitter feelings, such methods will be avoided as long as possible and carefully veiled when they are employed. If a report on an unsavory measure is desired, the chairman may refer it to a sub-committee composed of reliable henchmen. There may be many such measures before the committee, and the majority of the members may be otherwise so busily engaged that they cannot investigate the nature of all these sub-committee proceedings, and will thus be inclined to accept the reports which the chairman insists upon. During the latter part of the session when business is crowding, committee bills are often sent around to the various members with a request to sign the favorable report on them as they are "all right." Lack of time for investigation and undue confidence generally induce a majority of the members of the committees to affix their names, and the bills are reported.

The constitutional and legal rules of procedure are

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all modified in practice to accord with the peculiar methods of the organization. Constitutional safeguards are almost futile as long as the organization has the power to command action by common consent. The reading of the journal is quite often dispensed with, and this document which authoritatively records the action of the legislative body is usually not printed till several days have elapsed. The calendar which ought to be a safe guide to members is made up arbitrarily and disregarded in practice. Measures are placed upon it, or taken off, or advanced over others at will by "general consent." The confusion in the sessions is often such that it is impossible to follow the course of business, leaving the speaker absolutely free to interpret according to his own pleasure and interest what is being done. The rapidity with which the organization can carry through its measures is illustrated by the street railway franchise bills of 1901 in Pennsylvania. The bills were referred and reported back in five minutes. They had three separate readings in the Senate and the House on successive days, and were then immediately signed by the governor. Thirteen city councils, tools of the organization, under authority of these acts, forthwith turned out the necessary franchises. The quality of the parliamentary law created by the machine is illustrated by the decision of the speaker of the Pennsylvania Assembly on the Erie water front bill. Four members had been wrongfully recorded as voting "Aye," their votes being necessary to pass the bill. Objection being made when the journal was read, the speaker ruled that the roll-call record could

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not be changed. This extraordinary ruling of course put it into the hands of the speaker to pass any bill he pleased by simply instructing the clerk to record a sufficient number of names as voting "Aye."

The true inwardness of organization gavel-rule is excellently brought out in the following paragraphs in a pamphlet on the Illinois Legislature prepared by the Illinois Legislative Voters' League in 1903:

"To explain the importance of House organization it is necessary to discuss the parliamentary rules and tactics used in steering a bill through the House. The road is long and hard without the friendship of the committee to which the bill is referred and of the speaker, who can wield the gavel to help or hinder its progress. The bill must go to committee, be printed, be reported out to pass and be read on three different days. It may be amended after the second reading; it must be engrossed before the third reading. Then it is in the order of passage, and requires in the House seventy-seven votes to pass. With a friendly House and speaker, it may on introduction, by unanimous consent (wholly dependent on the speaker's hearing objections if made), be read a first time without reference to a committee, read a second time on the following day and on the third day passed. This is the short road. The bill to provide for the incidental expenses of the Assembly invariably follows this route.

"On the other hand, consider the petty annoyances to which a decent member outside the 'organization' may be subjected, and the methods by which legitimate legislation, backed by him, may be blocked.

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The bill goes to an unfriendly committee. The chairman refuses to call the committee together, or when forced to call it, a quorum does not attend. In case a quorum attends the point may be raised that the bill is not printed, or the chairman may fail to have the original bill with him. Action may be postponed on various pretexts, or the bill may be referred to a sub-committee. The committee may kill the bill by laying it on the table. On the other hand the committee may decide that the bill be reported to the House to pass. Then a common practice is for the chairman to pocket the bill, delaying to report it to the House till too late to pass it. When finally reported to the House, it goes on the calendar to be read a first time in its order. Then begins the advancing of bills by unanimous consent, without waiting to reach them in order. Here is where the organization has absolute control. Unanimous consent is subject to the speaker's acuteness of hearing. His hearing is sharpened or dulled according to the good standing of the objector or of the member pushing the bill. If one, not friendly to the House 'organization,' wants to have his bill considered over an objection, he must move to suspend the rules. The speaker may refuse to recognize him, or may put his motion and declare it carried or not carried as suits his and the 'organization's' desires. So the pet bills are jumped over others ahead of them on the calendar, while the ones not having the backing of the House 'organization' are retired farther and farther down until their ultimate passage becomes hopeless. If the bill of the independent member reaches second read-

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ing it may be killed by striking out the enacting clause or by tacking on an obnoxious amendment that makes it repulsive to its former friends. A referendum requiring not a majority of those voting on the bill, but a majority of all the votes cast at the election to adopt it, is a new and favorite method of shelving a bill by amendment. To carry out the will of the organization, the speaker declares amendments carried or the contrary on *viva voce* vote. Demands for roll-calls are ignored by him in violation of the members' constitutional rights. This is called gaveling a bill through. Formerly the gavel was used to carry through political measures of the majority party and to prevent obstructive and dilatory tactics of the minority party. By a gradual growth it has come to be used to help or defeat legislation in which the organization has an interest, although the majority may have a contrary view. What the speaker declares, the clerk must record, and what the clerk records no court will set aside."

When a measure called for by public opinion has finally been permitted to reach the floor of the House, there still remains the supreme test of amendment by which its purpose may be utterly changed though its name be retained. The history of the Mueller bill in the Illinois legislature offers a classic example. The Senate in response to pressure from the reform element had passed the bill and had safely entrusted it to the organization committee in the House in the assured confidence that it would be made harmless. A member of Congress, at the time the boss of the organization, tried to persuade the reformers to accept the

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Lindly amendment on the ground that nothing better could be secured. The backers of the bill refused and, considering the extent to which public attention had been aroused, the bill had perforce to be reported in the House. No discussion was there allowed; the Lindly amendment was offered and the speaker proceeded to gavel it through. Then for once the opposition revolted. With loud shouts of "roll-call," the members rose from their seats and rushed toward the speaker, who was obliged to flee for safety. The House immediately calmed down, elected a speaker *pro tempore*, and passed the Mueller bill in its original form.

A consideration of the legislative measures actually demanded by the special interests will make it plain that they are not based upon the idea of equal justice to all interests and classes of the community, but that they constitute a plain attempt to get unusual advantages and privileges for certain groups. Railways seek exemption from taxes, freedom from restrictions upon their traffic management such as the requirement of safety appliances, and absolute liberty to control their rate schedules. Electric railways and gas companies demand long term franchises and exclusive monopoly rights and the gratuitous concession to them of valuable public property. The successful work of the trolley interests in Rhode Island is very instructive. In 1891, an act was passed by the legislature empowering any town council to grant exclusive street railway franchises for twenty years. However, the promoters soon found that they had made a mistake in not asking for a perpetual charter

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which would have been far more acceptable to investors. As even in Rhode Island pills have to be sugar-coated and the outright demand of the article they wanted might have been too startling, they secured the passage of an act imposing an annual tax of one per cent. on the gross earnings of the street railway corporations accepting it. This combined statute and contract was held to imply a recognition on the part of the state that the charters held by the corporations were unlimited by time.<sup>1</sup> A sweeping monopoly was secured by the Consolidated Street Railway Company in Connecticut in 1905. This corporation is a holding company by which the New Haven Railroad controls its trolley system. The legislature being favorably disposed, the company got a charter of almost unlimited privilege, to which was added a clause vesting the corporation with all the charter rights of any or all of the constituent companies, so that whatever species of franchise or privilege has ever been secured by any company of this nature in Connecticut is now enjoyed completely and forever by the Consolidated Railway Company. Not satisfied with these achievements the company riveted its monopoly by having the general railway law in the state amended so as to prohibit new competing lines from crossing the state without express legislative sanction. A very interesting instance of the difference it makes whose sheep has been bitten is afforded by a bill introduced in Pennsylvania in 1905, forbidding any constable from serving papers for any organization unless the consent of the police had first been

<sup>1</sup> Public Laws of R. I., 1898, ch. 580.

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secured. This bill was directed against the Law and Order Society of Philadelphia, which for two decades had fought lawlessness and vice in the metropolis and secured for it what immunity from violence and crime it has enjoyed. The existence of such an association, which actually attempts to enforce the law, was of course a thorn in the flesh of the "gang." The bill, though opposed by some members, got along finely until the Pennsylvania Railroad discovered that their own investigation and prosecution of crimes against their property would be impeded by it. Then suddenly the bill sank below the surface never to appear again.

The campaign made for a long-term franchise for the Chicago street railway companies was full of striking turns and deviations. For this purpose the state machine, which the railways had built up, but which just then they did not need especially, was utilized. The measure passed both houses without difficulty, but happily the governor was a man who guarded the public welfare. So the "interests" had to go to some trouble in order to secure more willing instruments. When the session of 1897 opened, their hopes stood high. The Humphrey bill granting a fifty-year charter was introduced; but meanwhile the reform sentiment had grown so strong that, while the gas combination bill was passed and signed, the nerve of the managers failed them when it came to traction legislation, and they substituted the Allen bill which conferred upon the Common Council of Chicago the power to grant a long franchise. The bill was stoutly opposed by the reform element and had to be gaveled

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through the House. But the opposition was now thoroughly aroused, and by dint of the greatest vigilance they prevented any extreme action by the Council. They demanded legislation giving the voters of the city the power over traction matters; and although a bill for this purpose was in 1901 strangled in committee, they succeeded two years later in having the Mueller bill passed which has already been referred to.

The desire of the politician, lobbyist, and boss to give powers to officers or boards which they feel able to control, is at the bottom of that unsettling and dismembering of institutions which is effected by the so-called "ripper" legislation. The term "ripper" bill designates a measure which, in disregard of constitutional practice and rational principles of administration, tears to pieces constitutional and legal arrangements and distributes administrative powers among willing tools. "Ripper" legislation is the fruit of "ripper" practice in legislative procedure. The total disregard of constitutional and parliamentary rules naturally leads to legislation in which all principles of a sane and settled polity are ignored. As the party machinery grew more and more invincible in Pennsylvania, the constitutional restrictions of 1873 were gradually set at naught. Only upon rare occasion was the political conscience successfully appealed to, as when in 1889 Governor Beaver asked for the enforcement of Article 17 of the Constitution. The Pennsylvania machine has been an adept in "ripper" legislation; among striking examples of such measures are the following: An act depriving district attorneys of the right to challenge jurors in certain

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cases,<sup>1</sup> an act taking the power to grant liquor licenses from the judiciary and giving it to a state excise board, an act granting away water power belonging to the state, and a law which gave final power in matters of assessment of property in Philadelphia to the Board of Tax Revision. In 1905, the machine politicians propounded a new constitutional doctrine to the effect that inasmuch as a majority of all registered voters had not voted for a certain constitutional amendment but only a majority of those actually voting upon it, the legislature was not bound to enforce it. As this amendment required the personal registration of voters, its enforcement would have touched a most sensitive point of practical politics in Pennsylvania.

Interesting instances of "ripper" legislation can of course be gathered from many states. It is a frequent practice of the machine, when it fears the election of a hostile governor, to have the appointive power, or a part of it, transferred to the legislature. The Goebel law, which has caused Kentucky such endless trouble, is also of this general nature, although its passage was due to bitter party struggles, rather than to the influence usual in such cases. It enacts that the governor shall appoint the local election officials, and that the legislature shall canvass the election returns without any appeal to the courts. A most

<sup>1</sup>This act was introduced in order to influence the selection of jurors in political trials. A few years previously, when the district attorney of Philadelphia had been controlled by the machine, the office had been given additional powers, but now that the district attorney was independent, these powers were removed.

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ambitious scheme of "ripper" legislation, fortunately unsuccessful in the end by a narrow margin, was conceived in the Illinois Senate in 1903.

The favorite field of "ripper" legislation is, however, municipal government. By shifting administrative functions from state boards to municipal bodies and *vice versa*, the loss of power by the organization in any locality can be neutralized and periods of strong local opposition successfully tided over. In this practice the politician always finds some interest to appeal to. If he desires to curtail the powers of a municipality, he will enlist the country members against city privilege; and if the dominant party in the locality in question happens to be opposed to the majority in the state, it is easy to make a party question of the authority of municipal officers. There is always a certain latent opposition between the rural and the urban representatives, which is played on with great success by the boss and his associates. At times the virtuous abhorrence of the country member for the vices of the large town is utilized to effect such legislation as the Raines hotel law, which allows the local machine to levy a heavy tribute on tolerated vice. The shifting of power at will from one governmental organ to another is especially useful in "trolley" and gas legislation. For when public indignation has been aroused against some bold raid in a municipal council, the legislature itself can more safely furnish the legislation demanded by the special interests; or again at times when public energy has spent itself in watching that body, an act giving ample powers to some municipal organ may effect the

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desired purpose. The "ripper" legislation in Pennsylvania included an attempt on municipal independence, in the act,<sup>1</sup> by which the rightfully elected municipal officials of Pittsburg who were hostile to the machine were coolly legislated out of office, and the governor's appointees substituted for them. The city of Pittsburg therefore had successfully rebelled against its local machine only to fall into the hands of the more powerful political bosses at the state capitol. A similar example of undue interference with municipal law on the part of the legislature, was the act of May 5, 1905, by which the power of the mayor of Philadelphia to appoint heads of departments was curtailed.<sup>2</sup> The bill was introduced so late in the session that unanimous consent was necessary to its passage, but the control of the machine was so perfect that "no objection was heard." Even in Massachusetts there has been a strong tendency on the part of the legislature to extend the power of

<sup>1</sup> Act of March 7, 1901. It abolishes the office of mayor in cities of the second class, and vests executive power in the "recorder." It was held constitutional by a divided court in *Commonwealth v. Moyer*, 199 Pa. St., 534. The undisputed facts are stated in the dissenting opinion as follows: "It applies specially to the three cities of Pittsburg, Allegheny, and Scranton; it changes their charters; . . . puts them under special provisions; . . . governs them by a high executive officer of the commonwealth, resident at Harrisburg; necessarily ousting local officials elected by the people, whose terms had not yet expired."

<sup>2</sup> See Laws of Pennsylvania, 1905, pp. 390-397, for the governor's message vetoing similar bills but approving the above act, after citing Jacob, Nero, Charlemagne, Lincoln, Pope, the Anabaptists, etc.

state officials at the expense of municipalities.<sup>1</sup> The city of Boston is constantly objecting to legislative interference, and in 1905, Mayor Collins in vigorous terms vetoed a proposal for co-operation of the state and city in a certain improvement. An exceedingly bold use of "ripper" legislation occurred in Michigan in 1900. When Detroit had elected a Democratic mayor, one of the city officials who had failed of reappointment formed a triumvirate with two other local politicians who, backed by the Governor, secured the passing of a bill depriving the mayor of his appointive power and giving it to the Republican City Council. Under this arrangement the triumvirate controlled the city and sought popularity by running a "wide open" town. When one of the trio was convicted of bank-wrecking, he was released by the governor on parole, and another member who had already served a term in the penitentiary was appointed on the Board of Prison Control, presumably on account of his expert knowledge. We can contemplate with some satisfaction the general house-cleaning which followed close upon this remarkable era of municipal statesmanship. As this case shows, the legislature, although the agent in effecting "ripper" legislation, is not always the prime mover. The impulse very often comes from defeated factions in the localities in question, who failing of election pro-

<sup>1</sup> E. g. the police boards of Boston and Fall River. The act increasing the term of the mayor to two years was passed to assist the Republicans in Boston, but it resulted to the contrary in strengthening the hold of the Democratic party.

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mote such legislation as will restore power to them through appointment.

The situation in Illinois is rendered difficult by the inveterate misunderstanding between Chicago and the rest of the state. The large representation which Cook County has in the legislature (over one-third of the members) causes no little jealousy on the part of the country districts; while Chicago on her part is rather inclined to look upon the country members as of small account. This state of affairs in ordinary times is very welcome to the politician as it enables him to play off the two sections of the state against each other. Nevertheless in times of real need the country districts have nobly come to the rescue of Chicago. It was the assistance of the country members and their constituencies, aroused by the reports of legislative action in the Chicago papers, that helped the citizens of Chicago to defeat the fifty years' franchise bill of 1897. In 1899, Chicago appealed directly to the people of the state for the defeat of the Allen substitute bill, with the result that only two of the sixteen retiring senators who had voted for the Allen bill were reëlected, and fourteen of the eighty-two representatives. In Missouri the interference of the state politicians with municipal government was formerly so outrageous that it became one of the chief articles in Governor Folk's program to give municipal home rule to St. Louis, Kansas City, and St. Joseph. The only legislation effected in 1905, however, was to take the appointment of the St. Louis police out of the hands of the governor and give it to the mayor of that city.

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It is natural that in the state of New York there should have been a close connection between legislative politics and the administration of the metropolis. Constant interference or "reform" of the city government began when the Republicans came into power in 1857. Between that date and 1890 eleven different charters were enacted for New York and the interests of the city became the chief capital upon which state politicians traded. At times the most vicious legislation against the interests of the city was promoted by the New York delegation itself, who, faithful to their profession as politicians, betrayed the interests which they were supposed to represent. Such was the case in 1892, when they supported the election inspector's bill, the Foley excise bill, and the Central Park speeding bill, which favored the sporting interests at the expense of the rest of the community.

Though it often happens that the politicians more directly representing industrial interests and those who favor a lax police administration belong to opposing political parties, there is by no means always a real opposition between them with respect to this matter. Indeed it frequently happens that those in control of the state machinery will help the grafters on local vice through the passage of a certain kind of "good" laws. Virtuous on their face, these enactments render the traffic in police immunity far more profitable because they are too exacting to be actually enforced against all; and therefore immunity, which under the circumstances will be granted to some, is sold at a very high figure. Instances of this kind of legislation, supported in many cases by the agencies that are really

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wishing and hoping for good government, are unhappily very common. Through the enactment of such laws the party manager has paid his debt to the respectable element in the community. He can then proceed to hold the law as a club over the middlemen of vice and extort from them substantial contributions. The bosses of the machine are therefore not inherently indisposed to favor "good government" legislation. Among the men whose names are prominently connected with moral reform legislation we need not be surprised to find those of politicians, the nature of whose actual alliances are too well known. When, therefore, the cry of good government is raised by this kind of politician, the real friends of decency do well to be on their guard, for in most cases what the bosses desire will be the creation of what Mr. Jerome calls an "administrative lie," *i. e.*, the placing on the statute books of stringent laws against liquor and vice, the very strictness of which is, however, made the means of extortion by the local political managers. It frequently happens that the influences representing lax morality gain important privileges from the legislature through acts the full bearing of which is not realized by the members in general. This has often been accomplished in connection with so-called "Breeders'" legislation. Thus, for instance, the breeders' law of 1897 in Missouri, which prohibited betting on horse-races "except on race-tracks," and which was ostensibly passed for the encouragement of the breeding and training of horses, was signed by the governor without a recognition of its sinister purpose. In 1905, at the very end of the

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session, the New Hampshire legislature passed a law (Ch. 232) to incorporate the New England Breeders' Club, according to which the club is given the right to hold fairs and horse-races, and is permitted to furnish its own police; betting on horse-races is forbidden, the penalty, however, is only the forfeiture of the amount of the bet in a civil action. The abuses which may arise under such lax legislation are apparent, and the people of New Hampshire were much aroused about this charter, although the administration of the Club has given assurance that no gambling is to be allowed.

## CHAPTER IX

### PUBLIC FORCES INFLUENCING LEGISLATIVE ACTION

It has been shown in the last chapter that legislative action is frequently determined by influences of a private nature which are exercised more or less in secret, and through methods that are not in accord with the spirit of our institutions. While such influences are by no means everywhere, nor always, in control, they have at certain times made themselves dominant in nearly every one of the commonwealths, and their recrudescence is possible at any time. In order that such sinister conditions should be avoided it is necessary that the public sources of the legislative will should be developed and their constant and normal action facilitated. The legislature itself originates comparatively few laws. Most of them are suggested by outside influences, and are taken over and made their own by legislators. Legislatures indeed rather shun originality; they are more inclined to copy enactments from other states, and really new departures in legislative experiments, original solutions of legislative problems, are mostly suggested by active men or organizations outside the legislative bodies.

Considering the prominence of party polities in our

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national life, it would seem natural that party action should have a determining influence in legislative matters. Quite the contrary, however, is true as far as actual legislation is concerned. Party lines are indeed drawn and members are known as Republicans, Democrats, etc.; but ordinarily the party organization in a state is merely a subsidiary part of the national machinery, and represents no distinct policy of state government and legislation. The state platforms of the various parties frequently deal with national questions, with patriotic declarations, and vague statements of principle. Even when they contain planks referring to some matter of merely local importance, such resolves are not always followed by specific legislation. While the legislature is being organized, its offices distributed, and the United States senator elected, party activity is indeed very animated. On such questions as the redistricting of the electorate, or the creation of new local units of government, party discipline is also usually kept up, but questions of general legislation are more rarely made a matter of party difference.<sup>1</sup> The frequency

<sup>1</sup> Thus in Illinois in 1903 there were only two strictly party votes, one on the election of a United States senator, the other on the formation of a Supreme Court district. Under Professor A. L. Lowell's criterion of considering a vote partisan when nine tenths of the party vote in a certain way, there were in the Iowa Senate of 1898, only three party votes out of 372; in the House, only nine out of 394. In the Minnesota Senate of 1903, there was no party vote; in the House, one out of 741, that one being on the election of the speaker. In the Wisconsin Senate in 1893, there were three true party votes out of 116 recorded yea and nay votes; in the House, ten

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of unanimous votes is surprising. It is very usual for more than one half of the votes in the session to be unanimous. In Minnesota, this class of votes in 1903 comprised more than eighty per cent. of the total. In states where the organization is strong, the mover of a bill will usually be satisfied when he has secured the required number of votes for his measure, so that a large number of bills will be passed by exactly the required constitutional majority, and often without opposition. The opposition can ordinarily muster a party vote with greater ease than the party in power, both on account of its smaller size, and on account of the fact that its mission is rather to criticize and delay than to construct. At times when state matters have been given an unusual prominence in the party struggle, party votes will be more frequent, as was the case during the Populist régime in Kansas. On account of the even balance between parties in New York, as well as the importance of the state as a political unit, there has been far more strict party voting in its legislature than is the case in other states. The general unimportance of party in ordinary legislative matters is also shown by the infrequency of party caucuses held to determine upon specific legislative measures. Such caucuses are as a rule held only when some question of personal politics is involved. The ordinary arrangement of legislative business in the larger states rests as we have already out of 145. The general average is somewhat higher. See A. L. Lowell, "The Influence of Party upon Legislation in England and America." Rep. of the Am. Hist. Assoc., 1901. Vol. I, 321.

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seen rather on bi-partisan arrangements, with an occasional use of party discipline by the managers for their own purposes.

The ease with which governors belonging to a different party from the majority of the legislature manage to get along also indicates that party is not an essential factor in state legislative and administrative work. Governor Folk, in carrying out his reform program, had to place his chief reliance upon the party opposed to him; and he actually received more assistance from the Republican House than from the Democratic Senate, which latter rejected his principal bill for the stamping out of bribery. Governor Douglas of Massachusetts, surrounded by Republican state officials and legislators, carried on a very successful administration. He maintained perfectly harmonious relations with the legislature and used the veto only four times, in three of which instances he was upheld by the General Court. Governor Toole of Montana, under similar circumstances, secured the passage of most of the measures in which he was interested, although he was forced to veto a number of legislative bills. Governor Johnson of Minnesota also lived in amity with the legislature though representing the opposite party.

Public opinion, which is theoretically the guide and source of legislative action, has in practice given very little attention to state legislatures, and has ordinarily allowed narrower interests to prevail without let or hindrance. But occasionally when it has been aroused on account of some crying abuse, or has become in-

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terested in some important measure, it constitutes for a time the predominant factor in legislation. A striking instance of such public interest in matters of state policy is found in the movement in Pennsylvania in 1872, which led to the calling of a Constitutional Convention, on account of the public indignation at the prevailing bribery; or in the formation of the Law and Order Society which secured for Philadelphia its charter, and induced the legislature to pass a high license law in 1887 as well as to confer upon the courts the power to grant licenses. In New York, public opinion has been active in behalf of such measures as the franchise tax law and the tenement law, which latter was passed against the onslaughts of a most powerful lobby representing builders, real estate owners, and material men. The manner in which public opinion in Illinois defeated the machinations of the street railway interests of Chicago has already been referred to. Public opinion in such cases becomes articulate through newspaper propaganda, and through the organization of various reform associations. While the special interests, of course, always provide themselves with newspaper organs, such affiliations are soon discovered by the public and the editorial column of such papers loses its influence. Some of the most gratifying defeats of machine manipulations in legislatures have been brought about by the hue and cry raised by the independent metropolitan press. The country papers on the other hand are generally less efficient, being more dependent upon large advertising contracts from patent medicine frauds and other exploiters of the public.

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Reform organizations have appeared in a multitude of forms and have worked with varying degrees of success. An interesting example of an organization which follows out the purpose of raising the general quality of legislative representatives and enactments is the Legislative Voters' League of Chicago. In its bulletins it gives a brief account of the actual work performed and the measures favored by the representatives who are candidates for re-election. Its efforts seem to have had a salutary influence upon the legislature. Thus, for instance, the payroll stuffing which it specially attacked has almost entirely disappeared. In 1903, the legislature had 393 employees who were paid \$110,000; in 1905, it managed to get along with 211 and a payroll of \$65,000. The dangers which beset reform activity are of many kinds. Reformers are ordinarily somewhat too independent and individualistic. They find it difficult to work together, and their factional, contradictory appeals confuse and irritate the legislators. Moreover, the ordinary legislator will listen to the business man or the lobbyist who represents some concrete interest affected by legislation; he will also perforce listen to the representatives of organized reform, who may command a powerful array of votes; but the individual reformer is an unwelcome guest in the legislative halls. The interest which he represents is too vague and indefinite for the legislative mind. He is looked upon as a bothersome intruder, who takes it upon himself to teach the legislature its duty and to show it the way to proper legislation. The old American adage about minding one's own business is used

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against such men. In fact it is used unjustly and excessively, and it accounts for much of the abuse in our legislative life. The man who has some business to represent, no matter how disreputable, whether he has money invested in a patent medicine or in a race-track, has, in the minds of many legislators, a better standing before them than he who comes to argue for the rights and interests of the public. Reformers are, however, often too impatient, too uncompromising, to be successful in urging their point of view. The reform legislation in Illinois in 1905 was at times seriously endangered by the zeal and impatience of certain enthusiasts.<sup>1</sup> But the reform movement was so strong that even in the face of some indiscretions, the principal measures advocated were passed, though in a somewhat modified form.

The manner in which popular sympathy may at times gather around radical and unpractical measures is exemplified by the Kansas state refinery bill of 1905. The legislature was at first opposed to the governor's recommendation on this head; but considering the public indignation against the Standard Oil Company, the independent oil producers concluded that it would be best to utilize this enthusiasm, and under the wing of the refinery bill to carry through other important legislation. The bills thus appended to the main measure provided for the fixing of a maximum freight rate, declared pipe lines to be com-

<sup>1</sup> When one of them reiterated with loud voice and vigorous gesture before Governor Deneen, "We won't accept bill 121," the Governor remarked quietly, "I hope you won't veto it before it is passed."

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mon carriers, and forbade discrimination in prices for commodities. Though the speaker of the House was opposed to the original bill, which he considered unconstitutional, it was passed and carried in its train the other measures. This action shows clearly the character which popular interference will at times assume. An extreme measure, soon declared unconstitutional by the Supreme Court, was passed because it monopolized the popular interest; the bills following in its wake, for which the public cared little, were measures of real and permanent importance.

Legislative organizations will be careful not to defy public opinion, however ready they may be to defeat it. But when the organization forces begin to take an interest in a popular bill, its friends have need of the greatest caution and of unfailing watchfulness. Otherwise, while indeed a measure outwardly corresponding to the public demand will be passed, there will be attached to it brief and apparently unimportant amendments, which, however, in the end may result in the complete defeat of the purpose of the bill. The Elkins act for the improvement and better enforcement of the Sherman anti-trust law contains a short provision which declares that infringements shall be punished by fine and not by imprisonment. The attorney-general very soon discovered that the law could not be enforced through the imposition of small fines upon persons drawing immense pecuniary benefits from the system of rebates, and he instructed his assistants to proceed under the original law. During the entire struggle over the tenement house bill

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in New York and for years after it had become law, constant attempts were made to annihilate its efficiency by amendments. A favorite method used for the purpose of defeating an unwelcome law is to attach to it an amendment submitting the enactment to the people at the next general election, and providing that the law shall go into effect if a majority of all the electors voting at that time shall accept it.

The articulateness of public opinion becomes clearest and most convincing in commonwealths where the governorship is held by a man who is in close touch with the desires and needs of the people in general, and whom the various organizations favoring reform may trust to give authoritative representation to their views and reasonable demands. The importance of the reform governors is based not so much upon their position as heads of the administration, but upon their character as the authoritative interpreters of the public will. Their position gives them a greater sense of responsibility and a more complete view of the situation than is found in the ordinary lay reformer. While keenly alive to the interests and wishes of the people and desirous of doing away with abuses, they are apt to choose their ground with care and do not attempt the unattainable.

But the governor, as the head of the administrative departments and of the state government in general, also has a growing influence over legislative action. As governmental relations become more complicated and such intricate economic pursuits as banking, transportation, and insurance have to be dealt with by the legislatures, they more and more feel the need

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of expert guidance, and are willing to listen to the governor, the state officials, and the various boards and commissions, in matters of legislative policy and detail. In some cases this tendency has been so strong as to amount to a virtual abdication of legislative authority. At the end of the last session of the California legislature, the governor was left with a mass of hastily enacted measures on his hands. The legislature had opened the flood gates wide, with the avowed understanding that the governor would carefully sift and examine the product before giving his assent. It went so far as to pass mutually contradictory measures leaving it to the governor to choose between the alternatives or reject both. The result was that after the legislature had adjourned, the real work of legislation began. During the ten days allowed by the constitution the governor and his entire force of assistants worked day and night. Hearings, necessarily brief, were accorded to persons interested in proposed measures. The whole volume of legislation was carefully gone over, before the governor decided which of the enacted measures were to become law. Mr. Roosevelt, while governor of New York, took a very decided position of leadership. One of the measures which owe their existence chiefly to him and which he carried through in the face of an almost overwhelming opposition of lobby and representatives, is the franchise tax law of 1899. So solicitous was he for the success of this measure that he called a special session to correct certain flaws in its wording that had been overlooked. After a long and severe legal struggle, the law was finally

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declared constitutional by the United States Supreme Court in 1905. Mr. Odell, while governor, especially during his first administration, exercised a powerful influence over the legislature. His message of 1901 was practically taken as a legislative program and most of his recommendations were embodied in legislative enactments. But during the second term he was not so successful, failing in some of the measures which he valued most, such as the recording tax on mortgages, and the canal legislation.<sup>1</sup> Governor Crane of Massachusetts was a true leader in legislative matters. His most signal victory was the veto of the Boston subway bill in 1901; after his veto the opposition to the bill increased by ninety votes. Similar instances of leadership could be multiplied, and they are indeed a symptom of a healthy development in our political system. A position with such opportunities as the governorship could not remain an ornamental sinecure, but the possibilities for public service which it holds within it had to be utilized. It is often attempted to disparage the influence of active governors by stigmatizing them as bosses and insinuating that they are no better than the men who, through secret traffic in corruption, gain power without public confidence. But where a governor effectively organizes his own followers, on the basis of the public principles for which he stands, the headship of such an organization, the public leadership which it implies, must not be con-

<sup>1</sup> Mr. Odell's acceptance of the chairmanship of the State Central Committee was regarded as incompatible with the duties of a governor, and his legitimate influence declined.

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founded with the subterranean work of a corrupt political machine.

Among the most striking developments of the last decade or two, is the growth of expert commissions and boards in the state governments. In many commonwealths these organs of the administration are the direct descendants of legislative committees. Where there was originally a visiting committee for the state institutions, there will now generally be a Board of Control, though a visiting committee with limited functions may also still exist. The examining of banks was also originally performed, in a most superficial manner to be sure, by legislative committees. Before establishing a commission, the legislature has usually become acquainted with the need of administrative expansion along a particular line through the work of one or several of its committees. But while not all commissions or boards are formed in this manner, they all have an important connection with and bearing upon legislation. They are ordinarily themselves intrusted with a large power of legislation by ordinance. Thus the insurance commissioners are often empowered to fix the wording of the standard policy, and to make other important regulations. The legislature, moreover, relies upon these organs of government for information and advice concerning the part of the administration under their control. Laws affecting a commission are frequently drafted by itself and introduced in its behalf by some member. The times are over when a member lays himself open to contempt by admitting that a certain measure favored by him comes from the

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Executive.<sup>1</sup> In matters affecting the difficult relations of manufacturing industries, railways, banks and other credit institutions, taxation, and public service, expert authority is becoming more and more prominent in our legislative affairs, and is listened to with respect by our legislative bodies.

Among the expert agencies which influence legislation under the American system, the legal profession has long occupied a position of great prominence. The prejudice against lawyers which in many of the colonies led to the adoption of laws excluding them from membership in the legislature has given way,<sup>2</sup> and lawyers have long since become the most influential leaders in our national and local legislative assemblies. The peculiar American view of the character of a written constitution as an organic act which is interpreted, applied, and enforced by the courts, has emphasized the legal aspect of institutions. During the larger part of our national history, hitherto, lawyers were in all respects the natural leaders of the people. In the earlier days, they alone were trained to speak on public affairs, they alone had the necessary all around acquaintance with laws and political methods. But at present the impression cannot be avoided that the influence of the lawyer in

<sup>1</sup> In 1905, the dairy and food commissioner of Wisconsin introduced eighteen separate measures for the regulation of various food industries. He avoided combining them into one measure, in order to break up the inevitable opposition of special interests.

<sup>2</sup> Although, in 1847, a similar clause was strongly advocated in the Rhode Island Constitutional Convention.

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politics is on the wane. A statistical study of the *personnel* of the legislatures reveals a decline in the percentage of lawyers. In the United States Senate, the percentage decreased from eighty-one per cent. in the Fiftieth Congress, to seventy per cent. in the Fifty-eighth; and in the House, from sixty-nine per cent. to fifty-six per cent. in the same period. In the states an even greater decline of percentages is to be observed. The actual loss of influence of the legal profession, which is even larger than these percentages indicate, is due, however, not so much to this reduction in numbers, as to the change of temper which has come over our public affairs. Although the United States Senate still listens to extended constitutional arguments, the discussions of other legislative bodies are devoted far less to legal considerations than they were in former years. In fact, some of the legislatures have become impatient of legal arguments, and frequently pass laws regardless of constitutional objections, throwing the burden of determining the cogency of the latter entirely upon the supreme courts. The differentiation of the professional politician and the power which he has acquired through organization and machinery, has also reduced the influence of lawyers. While lawyers as a profession are somewhat narrow and over-conservative in legislative action, the change from legal to commercial methods of leadership has brought about many unfortunate results. However, lawyers will always be sure of a substantial influence as long as our system lasts. In the state legislatures they compose the important judiciary committee, to which all changes in

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existing laws are submitted. The training acquired by lawyers through the practice at the bar is of great advantage in a legislative career; and the leaders of the houses, the speaker and the chairmen of most prominent committees, are usually lawyers. Though not to the same degree as formerly, lawyers still constitute the most representative profession in the community. In their practice they come in contact with all classes and conditions in our social and economic life, and they have unequaled opportunities of observing the workings of law. So, while a government entirely carried on by lawyers would be extremely undesirable, a republic resting upon a written constitution and free from a dominating caste, can hardly be conceived of without considerable prominence being accorded in public affairs to the profession of law.

While the authority of administrative and of legal experience is openly present and active in our legislatures, the authority of the experience of large industrial and commercial enterprises is not so directly exercised. While the legislatures of our states contain farmers, lawyers, physicians, merchants, and real estate agents, one will look in vain for officers or managers of large industries or corporations. On the one hand, such men are not considered popular candidates; on the other, their business interests are so engrossing that they lack the time for public service. So they are practically excluded by prevailing conditions from directly assisting the state by their valuable experience. Their only contact with the legislatures is through the lobby and through committee

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hearings. It may be suggested in passing that all this would be changed, could we develop a system of open representation of interests, in which the arrangement of our institutions would correspond more directly to the organization of economic life than is the case with our present individualistic system. Each great interest would then be anxious to be represented by its most experienced and able men; and an Assembly composed of the select representatives of the industries, the financial corporations, transportation, commerce, labor, education, etc., would occupy a different plane from so many of the present legislatures in which practical politicians who represent only their lessors play a dominant part. In certain respects our legislatures are indeed representative enough; they are composed of a fair average of men in the various walks of life. But they are indicative rather of that average—a somewhat indifferent mean—than of great ability and experience in social and economic life. Unfortunately the various interests whose power is actually controlling are generally not represented at all in an open and acknowledged manner. They therefore use indirect means of exerting their influence to the endless harm of our political system.<sup>1</sup>

In states where committee hearings have not been reduced to a mere formality for recording the will of the organization, legislators are afforded the oppor-

<sup>1</sup> The system of representation of interests, while in use in connection with advisory councils, has not yet been adapted anywhere to a general electorate and a legislature sharing sovereign power.

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tunity of obtaining valuable information from the various representatives of interests who appear before committees. Such representation, which is also indiscriminately called lobbying, should be carefully distinguished from the use of secret and personal influence which rightly goes by that name. The fullest encouragement should be given all interests affected by proposed legislation to make themselves heard before the legislature. Open argument before a committee or before the legislature itself, or the written presentation of facts and of conditions is of course in every way perfectly legal and regular. Compensation for such services can be legally recovered, and contracts for such payment have a standing before the courts. The law is clearly stated by the Supreme Court:<sup>1</sup> "All persons whose interests may in any way be affected by any public or private act of the legislature have an undoubted right to urge their claims and arguments either in person or by counsel professing to act for them before legislative committees as well as before courts of justice. But where persons act as counsel or agents or in any representative capacity, it is due to those before whom they plead or solicit that they should honestly appear in their true characters, so that their arguments and representations, open and candidly made, may receive their just weight and consideration. A hired advocate or agent assuming to act in a different character is practicing fraud and deception on the legislature." In *Trist v. Child*, 88 U. S., 441, Justice Swayne said: "Services which are intended to reach only the reason

<sup>1</sup> *Marshall v. B. & O. Ry. Co.*, 16 Howard, 314.

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of those sought to be influenced rest on the same principles of ethics as professional services and are no more exceptionable. They include drafting the petition which sets forth the claim, attending to the taking of testimony, collecting facts, preparing arguments and submitting them orally or in writing to a committee, and other services of a like character; but such services are separated by a broad line of demarcation from personal solicitation, and though compensation can be recovered for them when they stand alone, yet when they are blended and confused with those which are forbidden, the whole is a unit and indivisible, and that which is bad destroys the good." Any services implying personal solicitation or any underhanded influence, therefore, cannot be made the basis of an action for fees or remuneration, and a lobbyist cannot recover in a court of law compensation for his services. In the great financial centers like New York, a practice has grown up which, while formally legal, carries with it a great temptation to employ corrupt means. Firms of lawyers will undertake to draft a bill for a certain purpose, have it introduced, watch its progress, argue it before committees, prepare written statements, and finally after it has been passed defend its constitutionality, which they guarantee. The remuneration paid for this service is at times exceedingly high, fees of \$100,000 being of not unusual occurrence. As the fees are contingent upon the passage and final validity of the law, it is apparent that they constitute an inducement to use methods which are not strictly professional. In fact, under the guise of legal representa-

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tion compensated by regular fees, some of the most objectionable lobbying is carried on.

During recent years, many legislatures have enacted laws and adopted rules designed to curb the evil of lobbying and to give a recognized status to proper representation of interests.<sup>1</sup> In some states the radical means has been adopted of declaring the attempt improperly to influence legislation a felony.<sup>2</sup> Many other states punish the corrupt solicitation of legislators by fine or imprisonment, or both. On account of the secret nature of the offense, convictions are, however, extremely rare, and the threatened punishment is in itself not a sufficient means to prevent the activities of the lobby. In some states it has been enacted that in a trial for legislative bribery, a witness shall not be excused from testifying on the ground of self-incrimination.<sup>3</sup> This refers, however, only to cases where bribery is directly charged. Under the rules of many legislatures the privilege of admission to the floor is restricted so as to exclude lobbyists. But these rules are not strictly enforced, except in Massachusetts, where the dignity and decorum of the General Court has been much increased by the rigid exclusion of unauthorized persons. In the states of Massachusetts, Maryland, and Wisconsin

<sup>1</sup> For a digest of the legislation, see Schaffner, "Lobbying," "Wisconsin Comparative Legisl. Bulletin No. 2."

<sup>2</sup> Utah, Tennessee, Oregon, Montana, Georgia, Arizona. The constitution of California declares lobbying a felony, but there has been no legislation to carry out this provision.

<sup>3</sup> Arizona, Montana, Pennsylvania, Washington. Governor Folk favored such legislation in Missouri.

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the attempt has been made to regulate the status and the activities of legislative counsel or agents. The main provisions of the laws of these states on the subject are as follows:

Persons employed to act as counsel or agent to promote or oppose any legislation affecting the pecuniary interests of any individual, association, or corporation as distinct from those of the whole people of the state are to be registered within one week after employment. The secretary of state (in Massachusetts, the sergeant-at-arms) is to keep two dockets: the one for legislative counsel before committees, to contain the names of counsel or persons employed to appear at public hearings before committees of the legislature for the purpose of making arguments or examining witnesses and also the names of any regular legal counsel who act or advise in relation to legislation; the other for legislative agents employed in connection with any legislation. The dockets are to be public records, open to the inspection of any citizen, and are to contain the names of employers and of counsel and agents, with addresses, occupation, date and length of employment, and the subjects of legislation to which the employment relates. All agents and counsel are to be registered before acting. Employment for compensation contingent upon success is not permitted. Legislative counsel not also entered on the agents' docket are limited to appearing before committees and to giving legal advice. Counsel and agents are to file written authorization to act. Within thirty days after final adjournment of the legislature, every person, corporation, or association employing

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legislative agents or counsel shall file a sworn statement of expenses with the secretary of state. Municipalities and other public corporations, are exempt from these provisions. In Wisconsin, a law of 1905 specifically makes it unlawful for any legislative counsel or agent to attempt to influence any legislator personally and directly otherwise than by appearing before the regular committees, or by newspaper publications, or by public addresses, or by written or printed statements, arguments, or briefs delivered to each member of the legislature.

A most effective method of dealing with lobbying would be found could the members of the legislature be made independent of the courtesies of the lobbyists. These persons, often highly trained and well informed, are able to render themselves exceedingly useful, as well as agreeable, to legislative members. Every new member desires to make the impression of accomplishing something for his constituents. He has certain measures which he wishes to bring forward. Totally unacquainted with the customs and procedure of the House, unfamiliar with the general nature of legislative life, he is at a loss what steps to take, and is practically forced to seek assistance somewhere. His fellow members are busy with their own measures and affairs, his salary is not sufficient to enable him to engage the expert advice of counsel. When he is befriended by the gentlemen of the lobby, who explain to him the procedure of the legislature and provide him with the material he needs, he is apt to accept their assistance and thus come under obligations to them. It is at this point that a really

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far-reaching reform in our legislative life can be effected by the use of the right methods. The experiment has been made in some states, notably in Wisconsin. Some years ago, the legislature of that state voted a small appropriation for a legislative reference library, and a man who had carefully studied history, economics, and politics was put in charge. With a small expenditure of money he rapidly gathered a valuable collection of reports, bills, and laws,—catalogued and indexed so as to be at all times readily available. When the legislature convened he was ready to give every legislator impartial service and reliable information. No matter what subject a member might be interested in, or what bill he might be desirous of introducing or combating, he need not be at loss for information as to what other states had done, how such legislative experiments had succeeded, and how to frame his own proposals. Bills were drafted for members at their request and they were given hints on important points of practice, and even arguments were prepared for them if they so desired. Unwearied service, universal helpfulness, impartial and tactful dealing with any public question brought up, enabled the expert to give the members exactly what they needed, to furnish them a place where they could go in the fullest confidence that the best sort of information and assistance which any effort could secure would be supplied to them. The result has been most gratifying. Already long before the session begins, inquiries commence to pour in, asking for information concerning legislative precedents, conditions in this and

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other states, the feasibility and constitutionality of laws, etc. Throughout the session the expert and all his assistants are working at red heat, keeping abreast with the endless and exacting demands made upon them. The members of the legislature, having an unpolluted source of information at their command, gain self-reliance and confidence, they are able to meet the pleader for special interests with strong arguments drawn from their independent armory. Some of the experienced legislative counsel who appeared before this legislature, declared they had never come before a body of men so well informed and so keen in their insight, and yet no more than good average representatives of the people of the state. Moreover, seeing the bearing of the questions with which they were dealing, not confused by half-understood arguments, the members have taken an increased interest in the work before them.

The idea of a legislative laboratory and clearing-house of information has taken root in other states as well. Dr. McCarthy's work has been the model for many commonwealths which have instituted similar departments. The State of New York has long had an efficient legislative library by which valuable studies in comparative legislation are issued. The position and work of the legislative expert must of course be kept absolutely free from partisan bias. In the state of Wisconsin, the appropriation for this department has been kept so low that it does not afford an attraction for political manipulations. It is necessary that this institution be more than a reference library. The real work is not done by rows of

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books and card-catalogues, no matter how well arranged and useful in themselves, but by a man who can deal with men and gain their confidence; who, without a shred of red-tape or official pomposity about him, is ready to make himself the servant of all, even when their little plans may strike him as ridiculous; but who must also have the mastery of the subject matter and of the sources of information that will gain him the intellectual respect of the men for whom he toils. It may be that in some states corrupt methods are so firmly entrenched that no improvement can be gained from such a system of liberal information and assistance, but in most cases this would seem a better way to defeat the lobbyist than the mere reliance upon punitive statutes. Wherever the right kind of service can be secured the tone of the legislature and the quality of the product will be improved without fail.<sup>1</sup>

✓<sup>1</sup> The bitter opposition of the "interests" against this reform shows conclusively that they do not want intelligence in the legislature. The work of a legislative reference bureau should not be confused with the purposes suggested for the "people's lobby." The latter, if organized, would exercise a general supervision over legislation. It would favor certain measures, oppose others, keep a record of the action of individual legislators, give publicity, etc. These matters, although desirable in themselves, are not included in the functions of the reference bureau, which exists merely to supply the individual legislator with accurate information, and to assist him in drafting bills and in doing other legislative work.

## CHAPTER X

### THE LEGISLATIVE PRODUCT

THE excessive number of legislative enactments annually produced in the United States has been the subject of much severe comment; yet, when the organization of legislative bodies is considered, this over-activity seems but natural. All surrounding conditions are favorable to it; democracies are impatient of delays and eager for action; they desire to see things accomplished; moreover, they have not lost the early optimism with respect to the efficacy of legislative remedies. The individual legislator feels that his services will not be duly appreciated should he confine his activities solely to a careful weighing of proposed legislation and a critical attitude toward the projects of his associates. Some positive action will be demanded of him; even if he does not put his name to some piece of general legislation, there will be a large number of local interests in his constituency which must be looked after. As a result of these conditions, the amount of legislation produced in the United States in the alternate years, when the larger number of legislatures meet, is astounding in itself, and, when compared with the legislation of other civ-

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ilized states, it indicates a crudeness of the legislative function, a lack of careful consideration, which are alarming. The number of legislative enactments passed in the states in a single year has exceeded fourteen thousand, covering in printed form some twenty to twenty-five thousand pages. During the five years from 1899 to 1904 the total number of acts passed by American legislatures was 45,552. The political and social service which in our own system required this flood of enactment was in the principal European states performed by a few hundred statutes. Of these 45,552 enactments, 16,320 were public or general laws, while the remainder were special and local. During the second session of the Fifty-eighth Congress there were introduced in the House of Representatives 20,074 bills and resolutions. The various House committees reported 4,904 measures and 3,992 acts were passed by both houses during the session. Of the measures enacted, 1,832 were public, 2,160 were private laws, 40 were joint resolutions.

It is the prominence and the great amount of private and local legislation which constitutes the chief blemish of the American system. As we have already seen, the attempt has been made to cut down the amount of private legislation by specific and general constitutional prohibitions; and while some relief has resulted from this method, it has on the other hand led to the frequent use of shifty practices by which local legislation is given the form of general law, and thus, in addition to its inherent harmfulness, has assisted in unsettling the stability of the legal system. The volume of legislation varies in direct proportion to

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the amount of special and local legislation passed. Thus in 1903, the state where legislation was most prolific was North Carolina, whose constitution contains practically no restrictions on local or private legislation, and whose governor possesses no veto power. The states in which measures prohibitory or restrictive of legislation have been taken, have as a result perceptibly lessened their legislative overflow.<sup>1</sup> Alabama's radical move in increasing the interval between regular sessions of the legislature to four years, was brought about by a very cloudburst of local legislation. The sessions of 1891 and 1901, passed approximately one law of general character to every eleven of private, local, or special application. In the latter session, out of a total of 1,132 measures poured out from the legislative mill, only about 90 were general in nature.

While examples of the abuse of private and local legislation might be gathered from all the commonwealths, the recent legislative history of Maryland furnishes such an abundance of striking illustration that it requires more than passing mention. Although

<sup>1</sup> Length of sessions and number of enactments in 1903:

	Days	Laws		Days	Laws
Colorado .....	90	181	New Jersey ....	80	273
Illinois .....	121	210	Oregon .....	40	173
Massachusetts ..	171	485	South Carolina ..	40	172
Missouri .....	76	207	West Virginia ..	45	80

Among seven states, not long in the Union, averaging in session sixty days: Minimum, Montana, 111 acts. Maximum, South Dakota, 226 acts.

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the constitution of this state contains certain limitations regarding the passage of special legislation, the Court of Appeals has given these provisions such a construction as to render them of little force.<sup>1</sup> Until 1903, there was no case declaring an act void under the clause against special legislation. In that year the Allegany corporation tax law of 1900 was held invalid.<sup>2</sup> The relative amount of special legislation is shown in the following table of percentages:

	1902	1904
Local acts .....	45 per cent.	56 per cent.
Special acts .....	35 " "	29 " "
General .....	20 " "	15 " "

The percentage of general acts includes appropriation bills, and many other acts not classifiable as permanent legislation; indeed, about one half of the general acts are only of temporary and limited application. In certain matters in which other legislatures quite generally prescribe a uniform practice throughout their state, Maryland adopts different procedures for the various divisions of the commonwealth. A most striking example of this occurs in the manner in which different forms of election procedure are applied in different counties. So great is the specializing tendency that matters of such importance as the law of corporations, of taxation, assessment, edu-

<sup>1</sup> *Hodges v. Baltimore Union Passenger Railway Co.*, 58 Md., 603. *Gans v. Carter*, 77 Md., 1. *Revell v. Annapolis*, 81 Md., 1.  
<sup>2</sup> *Baltimore v. County Commissioners of Allegany County*, 99 Md., 1.

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cation, legal procedure, and even the criminal code, are so bound up and embarrassed by local and special enactments as to lose the consistency and general validity which are usually considered essential to these branches of the law. The constant interference with local government is exemplified by the work of the session of 1888, which passed fifty-three separate local acts giving certain special powers to various county boards. The present extent of the local application of special measures appears from the fact that in the session of 1904 the legislature passed over twenty-five laws for the private benefit of one county alone (Allegany). The same session passed thirty-four varying local measures on the one subject of fish and game.

A particularly mischievous form of local legislation consists in the creation of the office of county treasurer in some districts, with its simultaneous omission in others, thus lessening the likelihood of effective administration. Worst and most dangerous of all are the local exemptions in matters of taxation. The session of 1900 alone passed fifteen acts freeing bond issues of certain localities from state taxes. It should be noted that no measure of this kind regarding Baltimore City has ever come within the limits of probability of passage. A prominent example of conflict between state and local interest is that respecting oyster beds. In this—a matter of great and long-continued interest concerning state property having an admitted need for a law of general application—the opposition of the tidewater district for a long time delayed the Haman bill of

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1906, notwithstanding the general advantage to industry and state therein assured. The strong desire of powerful interests for exceptional privileges and exemptions has resulted in their securing special acts of incorporation, while less favored enterprises must incorporate under the general incorporation law. The last decade has been especially prolific in this type of special legislation, the highwater mark being reached in 1900, when there were passed fifty-eight special incorporation acts and eighty-six acts amending private charters. The larger number of these charters are for public service corporations or banking companies. In many instances, the applicants are merely proxies for the real interest desiring the privileges conferred. In other cases, politicians secure such charters in order to dispose of them at commercial advantage to interests who are likely to be benefited by their possession or to be threatened by their use in the hands of rivals or blackmailers.<sup>1</sup>

In commonwealths, as in the national Congress, the worst phase of the localizing legislation appears not in the flood of local and special bills, but in the defeating, embarrassing, and mutilating of general laws in order to please a special interest. In the first place, the very volume of local measures with their peculiar importance to the individual legislator, subordinates vital interests to these special petty arrangements. As a result of this condition, the measures of most far-reaching importance are crowded to one

<sup>1</sup> See valuable report on "Evils of Special and Local Legislation," by Oscar Leser, in Maryland Bar Association Rpt., 1904.

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side, and receive passage perhaps, but not wise and concentrated attention. In its extreme, the localizing tendency leads to a system of group representation. The *liberum veto* of senatorial unanimous consent finds a not distant analogy in the state legislator's frequent ability to defeat a measure objected to by the interests of his locality. The organs of local government themselves are the greatest sufferers from the excess of special legislation. The function of county or municipal home-rule is in some cases atrophied, and in every instance mutilated, by the constant interference of the state authority. Measures that favor one locality usually do so at the expense of sister communities. A factor which increases the likelihood of favorable action upon proposals for local legislation is the quite usual practice of referring such bills to the delegation from the locality whose interests are directly affected by the measure in question. Matters like these are very rarely made subjects of party action, and by mutual arrangement meet with little or no opposition.

The total prohibition of private and local legislation would not be feasible. The power to make such enactments must be lodged somewhere; and if extreme prohibition should be placed upon the legislature, the circumvention of the constitutional law would only be increased. Other methods of dealing with this problem are therefore at present favored by the men most conversant with the situation. The New Jersey constitution of 1876 provided that the legislature "shall not pass any act regulating the internal affairs of towns and counties," leaving this to

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the local boards. The result of this policy has been gratifying. While in the years preceding 1876 the average number of local laws passed by the legislature was over 300, in the years from 1876 to 1905 it stood at an inconsiderable total per year. A commission of the New York legislature in 1896, which had made a careful investigation of the defects in legislative methods, fixed upon private and local legislation as a chief source of abuse. It pointed to the English system of private bill procedure as a model. Though for the time being this standard is unfortunately not achievable in the United States on account of special conditions, the commission recommended some modifications of procedure which in principle are a part of the English system. Thus it would require measures dealing with local and special interests to be filed some time before presentation in the legislature, notice to be given to those likely to be affected by their operation, and counter-petitions to be received from adverse interests. In a number of states notice of certain private bills is already required by constitutional provision, by enactment, or by the rules of legislative procedure.<sup>1</sup> Another suggestion of the commission is that private and local bills be placed upon a separate calendar, and that the expense of such legislation be borne by the parties interested.

It is not surprising that under prevailing conditions the legislative product has lost in quality what

<sup>1</sup> Constitutional provision: Rhode Island, Pennsylvania, New Jersey, North Carolina, Georgia, Florida, Alabama, Texas, Arkansas, Louisiana. Statute: Pennsylvania, Massachusetts. Rules: Virginia, Maine, Vermont.

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it has gained in amount. When it has become physically impossible for a legislator to give a careful reading to all the legislative bills proposed, even should he use the entire working time of the session, it is of course hopeless to expect the due consideration, weighing, and sifting of all the measures. Instead of fulfilling the ideal of rationally and thoroughly considering all proposed legislation, the work of the legislator ordinarily resolves itself to seeing that his own bills may receive a fair consideration, and to making such arrangements with other members that by mutual assistance their respective measures may have some chance of passage. In such arrangements the merits of individual bills are a minor consideration, the principal point being to ascertain what members are for the proposed measure, and what they are able to do for other members in return for the assistance of the latter. It is therefore not surprising that our legislation should in general be haphazard, inconsistent, and often absolutely incompatible, and that there should be absent from it the effective correlation of new measures with the existing body of the law.

Many statutes are intolerably confused and contradictory on account of the lack of logical acumen on the part of the framers, or on account of the use of that convoluted verbiage which has become the bane of legal pleading in so many states.<sup>1</sup> Enactments are overloaded with detailed regulations of

<sup>1</sup> Examples of verbiage such as the following are common in American statute law,—“The court may establish rules for its government and the regulation of the practice therein; pre-

matters which could much better be left to the executive agencies. They are often filled with repetitions and specifications probably designed to safeguard the public; but, on account of their technical and involved nature, these render the legislative product obscure and full of passages which necessitate further legal interpretation. Sometimes the slipshod methods of the clerical employees are responsible for the uncertainty of statutes. Thus in the McKinley act the sections relating to the tobacco rebate were omitted, though Congress had passed them, and the President actually signed a different bill from the one that had passed Congress. In Alabama when certain important words had thus been omitted from a statute, the governor, after the adjournment of the legislature, summoned the committee chairman and inserted the phrase in the engrossed copy. The whole process of engrossing is an antiquated method which has profitably been displaced in Indiana by having the bills, as amended for a third reading, printed, so that mistakes can be readily discovered by the legislators upon examination before final passage.

The principal source of confusion in the statute law is the practice of amendment without due regard to the new relations with other portions of the law, created by such amendments; or the process of implied amendment by simply passing a measure conscribe the forms and the methods of procedure before it, etc." (N. Y. Laws of 1897, Ch. 36, Sec. 265.) The General Village Act of New York (Laws of 1897, Ch. 414) also contains many examples of involved and ambiguous clauses.

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tradictory to former legislation, without any serious attempt to bring the older and the newer law into harmony with each other and definitely to supersede a portion of the older law by the new enactment. Mr. Bishop in his "Statutory Crimes" has forcibly described and characterized this practice in the following language: "Some of the greatest difficulties occur where enactment has been piled on enactment—where nothing is in terms repealed, but this year a statute is added to what was written last year, and so from year to year—and while the later law plainly repeals in part the prior, by construction, it as plainly does not repeal the whole; yet where the repeal begins and where it ends, it is difficult to tell." Congress has often amended laws that were no longer in force, having been repealed before, or it has passed amendments entirely overlooking former amendments to the same statute. Laws already existing are frequently overlooked by the legislators and are re-enacted in more or less modified form. The confusion in the statute law of many states is even worse than in the federal law. The canal legislation of New York presents a labyrinth of almost hopeless and irrational intricacy. Year after year laws were passed in utter disregard of former enactments, and the administrative officers of the state were left to decide for themselves what parts of the enacted laws were actually in force. With reference to the laws concerning public improvements in New York City and Brooklyn, the New York Court of Appeals declared that enactments had been re-enacted, modified, and

superseded so often that it was difficult to ascertain just what statutes were in force at any given time.<sup>1</sup> If the highest court of the state finds such difficulty, it may be imagined that to the ordinary citizen the confusion is hopeless, and that to the lawyer it means chiefly the opportunity for unending litigation. In 1893, the Pennsylvania corporation act passed in 1874 was made to include new corporations, but the amendments passed in the intervening years were not mentioned, and their validity and application were thereby thrown into doubt. The governor, though approving the measure on account of its general effect, severely criticized its structure. The Pennsylvania act of April 18, 1895, was drawn in such a slovenly manner that the interpretation given to it by the courts necessitated the passage of three curative statutes. The Pennsylvania legislature also made a clumsy attempt to revive certain local legislation by repealing former repeals of such enactments. In Massachusetts the consolidation of two laws requiring the closing of different classes of drinking places at 11 and 12 o'clock, respectively, was, on account of the use of a semicolon, given the effect of closing all such places at the earlier hour. The Royer law, passed in Ohio in 1902, divested the Supreme Court of that state of the larger part of its appellate jurisdiction, an effect not contemplated by the legislators. When the consequences of the act were understood, for the purpose of remedying it a special session was called at an expense to the state of \$50,000. The defects of the Illinois primary election law of 1905, which caused

<sup>1</sup> *In re Kiernan*, 62 N. Y., 459.

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the state Supreme Court to declare it unconstitutional, also necessitated an extra session of the legislature.

In states in which the statutes have been reduced to the form of a code, or have been given logical arrangement in a revision, the evils incident upon indiscriminate and careless amendment can be abated by the requirement that any new legislation of a general nature or any amendments of a general law shall in their title be referred to their proper place in the code or revised statutes. This would give an opportunity to the legislators for examining, without too extended a search, the relations of the new enactment to the law of which it is to form a part. But too much should not be expected from such a provision, without the assistance of expert agencies in the drafting and revision of a legislative bill.

Aside from a defective or redundant manner of statement and aside from the failure to analyze the relation of new amendments to the existing law, the chief source of the inefficiency of American statute law is found in the fact that acts are constantly passed which do not have a strong public sentiment behind them, or the enforcement of which is not properly provided for.<sup>1</sup> The true nature of law is not sufficiently considered by American legislators. Especially do they overlook the fact that a law should have back of it a public sentiment strong enough to make its enforcement regular and permanent. Laws are frequently enacted to quiet the insistence of a

<sup>1</sup> See an analysis of the Connecticut law from this point of view by Charles G. Morris, "Inefficient Statutes," "Yale Law Journal," XIV, 430.

limited class in the community without reference to their uniform enforceability, or they are an expression merely of a general sentiment of what ought to be, rather than a determined expression of the actual will of the community. It is a frequent practice to enact criminal statutes, the infringement of which cannot generally be discovered and satisfactory provisions for discovery of which are not made. Often machinery for the enforcement of a statute is not provided at all or is intentionally left so weak as to be practically inoperative. Thus a Wisconsin statute under which penal fines were to be turned over to the educational fund, did not contain provisions for forcing the county officials to make such payments. Another common example is found in the laws of escheat, for the enforcement of which adequate arrangements are rarely made. During the last decade a subject which has held the most prominent place in the attention of the public as well as the legislatures has been the regulation of trusts and of important industrial activities. The legislation proposed and enacted on this matter in Congress and in the various commonwealths of the Union, reveals all the weaknesses of a popular legislative body when dealing with economic problems. The rush of indiscriminate legislation in the earlier attempts to correct the evils of trusts and combinations, was in general so hasty and ill-considered as to be futile and to leave no permanent impress on the legal system of the country. As the public demanded action and as the most radical measures received the most favorable attention, time was not taken to study the intricacies

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of the problem, and enactments confidently turned out by men who had little mastery of the principles involved. When the authority of experience made itself felt through the courts and the logic of circumstances in the economic world, the futility of these earlier enactments was recognized, but the zeal for the indiscriminate application of legislative remedies did not abate. Only gradually are the legislatures discovering the inadequacy of good intentions in this matter, as well as the necessity of conservative methods resting upon expert knowledge.

A class of legislation in which many abuses occur and in which much effort is uselessly expended, is that attempting to regulate trades and professions. Organized labor has repeatedly made use of legislative enactments for the purpose of strengthening its organization. Laws are passed making definite requirements for a certain trade or profession, instituting commissions to conduct examinations, and providing that no license shall be granted to any person who does not satisfy the provisions of the law. The theoretical basis upon which such legislation is urged is that the public must be protected against untrained practitioners; and in professions requiring long technical training there is, indeed, a certain justification for this kind of supervision, although it may not in itself be sufficient to discourage the army of quacks of all kinds who prey on the public. But when it is applied to such trades as those of plumbers, barbers, and blacksmiths, it becomes void of all justification from the point of view of the general public; and leads to the introduction into the statute law of prin-

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ciples which cannot easily be kept within the bounds of equity and constitutional law. Courts have consequently interfered again and again with legislation of this kind. An example of purely demagogic legislation is the Pennsylvania alien tax law, which imposed a tax upon unnaturalized laborers, and the bakers' act of 1897, both of which were declared unconstitutional, the latter being in addition pronounced "meaningless and absurd."<sup>1</sup>

The attitude of the courts toward legislation has changed very much in the course of our national existence. During the earlier decades of the nineteenth century, the constitutionality of statutes was rarely disallowed, and then only upon very strong grounds and by an undivided court. A liberal benefit of doubt was always given to the validity of the law. But since the universal degeneration of the legislative product the courts have become more critical and have begun freely to use their power of enforcing the constitutional law in opposition to statutes. A statement such as was made by the Supreme Court of Pennsylvania in 1886, would have been thought absolutely unwarranted in the earlier years.<sup>2</sup> The court said, "It is our purpose to adhere rigidly to the constitution that the people may not be deprived of its benefits. It ought to be unnecessary for the court to make this declaration, but it is proper to do so, in view of the amount of legislation which is periodically

<sup>1</sup> For other examples see Hensel, "The Decadence of the Legislative Branch of our State Government," Pa. Bar Association, 1898, p. 105.

<sup>2</sup> *Morrison v. Bachert*, 112 Pa. St., 322.

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placed upon the statute book in entire disregard of the fundamental law."

The field of legislation in which the natural limitations of the legislative function are most clearly revealed is that dealing with amendments and additions to the common law. The English common law is peculiarly the product of social experience, its authoritative development and interpretation being left almost entirely to the legal profession with very infrequent legislative interference on the part of Parliament. Yet, in the eighteenth century this body of the law was in a condition of internal incongruity, contradiction, and fictitiousness which justified the severest criticisms by Lord Mansfield and Bentham. The experience of England seemed at that time to indicate that the legal profession itself could not be relied on adequately to adapt the common law to the changing conditions of society and to cast off such parts as had become incumbrances. At the very beginning of nineteenth century parliamentarism, the question of the relations of the legislative power to the common law of the state therefore presented itself most forcibly. The optimistic belief in the capacity of legislatures included the theory that the entire law of the state should be recast and conformed to simple and rational standards. This work, it was thought, should not be intrusted to the legal profession itself, because its members were bound by a formal conservatism; but it was rather to fall to the legislature as representing the common-sense and the rational instincts of the nation. Bentham and the earlier analytical jurists of England did not go beyond a

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logical deduction of all law from the legislative will. They saw in the legislature the actual reforming and controlling agency in matters of common or general law. The practical results achieved in consequence of the application of these views indicate clearly the true function of legislative bodies with respect to general jurisprudence.

The history of law reform in New York deserves special attention, not only because of the importance of this commonwealth and the fact that the jurisprudence of many other states is derived from it; but because the matter was in this state given the greatest amount of attention. Legal reform there had its most brilliant advocates and opponents; and the results hitherto accomplished give unmistakable indications of what is to be avoided and what may be achieved by legislatures in this matter. Agitation for law reform began early in the century. Governor De Witt Clinton took up the matter in his message to the legislature in 1825, when he said:

"The whole system of our jurisprudence requires revised arrangement and correction. A complete code founded on the salutary principles of society, adapted to the interests of commerce and the useful arts, the state of society and the nature of our government, and embracing those improvements which are enjoined by enlightened experience, would be a public blessing. It would free our laws from uncertainty, elevate a liberal and honorable profession, and utterly destroy judicial legislation, which is fundamentally at war with the principles of representative government."

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As a result a commission of three members was appointed to revise the laws of New York. This was the first attempt of any English-speaking commonwealth to subject the entire body of its law to legislative revision. Revisions had of course been made before but they did not go beyond methodical arrangement of the statute law, in which minor amendments were suggested and obsolete parts eliminated. The legal profession from the start opposed any general plan of reform, and the word "codification" was made a symbol about which a vehement controversy was carried on. The report of the commission was considered at an extra session of the legislature in the fall of 1827. The members in general took comparatively little interest in the discussion, and the recommendations of the commission were adopted with minor changes. On account of the strenuous opposition to a complete codification, the commissioners confined their work principally to the law of officers, of crimes, and of real property. The criminal law was in special need of reform, for though the American law was not in such a scandalous condition as that of the mother-country, it nevertheless was without a rational basis of distinction between degrees of crime. The changes introduced by the commission became the law not only in New York, but in many other states which copied directly from that commonwealth. The reform of the law of real property included the abolition of the feudal system of tenure, and the substitution therefor of the allodial principle.

The work accomplished at this time did not, however, permanently satisfy the law reformers, who de-

sired this method of revision to be extended to the entire law. Under the leadership of David Dudley Field, they adopted "codification" as their watchword, and demanded the reduction of the entire body of the law to rational arrangement, simple phraseology, and lucid principle. As a result of their efforts, the constitution of 1846 contained provisions in favor of code reform; and subsequently two commissions were appointed, one of which was to codify the law of procedure, the other the substantive law. The latter did not carry out its purpose; but the procedure commission under the leadership of Field worked rapidly, and in 1848 reported the first instalment of the code of civil procedure. It was only this first instalment that was adopted by the legislature, and it became the model of code procedure for more than one-half of the American commonwealths. The completed codes of civil and criminal procedure were submitted in 1850, but were not accepted by the legislature. The work of the commission however received instantaneous national and international recognition. Robert Lowe said of it, "No acquisition of modern times, no achievement of the intellect is to be compared with the removal of technicalities and absurdities in the common law practice." Though discouraged by the rejection of the completed codes, Field continued his efforts with singlehearted devotion to the principle of law reform. For eighteen years he worked steadily on the codes, receiving no compensation, but on the contrary paying his assistants himself. Through his efforts a new commission was appointed in 1859 to codify the substantive law.

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The final report was made in 1865, and a penal code, a political code, and a civil code were submitted. The civil code was twice passed by both branches of the legislature; but, failing of approval by the governor, was never enacted in New York, although copied by Dakota, California, and Montana. The penal code was finally adopted in 1882. During all these years the legislature had been making profuse amendments to the original code of procedure. In 1877, its entire revision was undertaken, notwithstanding the opposition of Field himself, who said, "The new code is merely the old code disfigured and disguised." The guiding idea of the original code had been simplification; the revision was so cumbersome and complicated as to be opposed to the inherent principle of law reform. As a matter of fact the ideal of the original law reformers that the law should be simplified and rendered more logical and reasonable, was totally abandoned by the legislature in actual practice. Aside from the revision of 1877, when the code was overloaded with a heavy mass of intricate enactment, the legislature annually amended the code by numerous detailed provisions. This legislative interference led to such uncertainty in practice that about one half of the decisions of the higher courts in New York dealt with questions of procedure. The result of this attempted simplification is remarkable when compared with the procedure of jurisdictions that have not been affected by such legislation. The equity procedure of the Federal courts is carried on under the simplest rules. In none of the New England states would there be more than two volumes of decisions on

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questions of procedure. But the New York Code of Civil Procedure alone, with its annotations, fills at present four volumes containing, in the aggregate, over four thousand pages. To this must be added about one hundred and twenty volumes of reported decisions dealing exclusively or primarily with questions of procedure under the code. When it is considered that this is but one branch of the law, of less importance than the substantive civil and penal law, the full meaning of this flood of legislation and consequent decision may be appreciated.

The worst use of the practice of amendment is apt to occur when lawyers, in charge of certain litigation, encounter in the code a provision unfavorable to their side of the case; and, using their influence with some legislator, introduce a bill amending this particular section to suit their temporary convenience. As the ordinary members are not interested in code amendments, such a provision is very likely to pass without scrutiny. The function of amending the law of procedure has therefore degenerated into an instrument for obliging private parties, with a result that the law is kept in an intolerable state of uncertainty.<sup>1</sup> In the

<sup>1</sup> Instances of an unjustifiable use of the power of amendment are found in section 3063 of the proposed New York civil code of 1887, preventing the recovery of damages against elevated railroads for nuisances of smoke and noise; and chapter 572 of the Laws of 1886, which requires a notice of the intention to bring suit against a city for damages, to be filed with the corporation counsel within six months after the injury. The latter was so indexed as to be concealed; and is said to have been put through the legislature to make a record for the New York City corporation counsel in defending suits against

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eight years from 1890 to 1897, eight hundred and four sections of the code were amended, more than double the number in the original code; and the amendments which were added between 1902 and 1905 fill a quarto volume of 500 pages. The code itself at present contains 3056 sections. The substantive law has fared but little better than the law of procedure. In 1889, there was appointed in New York a statutory revision commission. The work delegated to this body was not a codification of the common law, but a logical arrangement and restatement, without substantial change, of the general statutes. The commission reported forty-eight general acts which were adopted; but in the first decade after their adoption, over two thousand amendments to them were passed. The amendments to the New York general laws made in the years between 1901 and 1904 would cover one thousand pages. The work of the commission was criticized because it did not make a careful page to page revision of all the session laws, but founded its work rather upon former collections. It was abolished in 1900, and in the following year a legislative committee of fifteen reported in favor of a complete consolidation and analysis of the general and local laws of New York. In 1904, there was accordingly appointed a Board of Statutory Consolidation of five members which has now completed the work.

the city. There already existed a statute requiring the filing of such notices with the Controller. See Clarke, "The Science of Law," p. 271. In Wisconsin, certain lawyers attempted to change the law of guardianship, in order to secure control of the person of a minor for a client.

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The dangers of legislative law reform occur in other states, although not in the extreme manner which has been witnessed in New York. All our commonwealths have suffered from ill-considered amendments, which unsettle the law and render it uncertain how far decisions already made under older laws still apply.

Among southern states, Virginia had a very thorough revision of her statute law in 1849. A new revision was passed in 1904 as a single act without a written report being submitted by the advisory commission. The work of the commission, however, seems to have been well performed. The Virginia "Code" is not a real codification of the law in all its branches, but only a systematic statement of the statutory general law. The same is true of the "codes" of Tennessee, South Carolina, North Carolina, Mississippi, and Alabama. Georgia, however, adopted a complete system of codes in 1860 which were revised in 1895, and which embrace the entire common and statutory law, both substantive and adjective. The administration of the law under the Georgian codes has on the whole been satisfactory, and the legislature has not been guilty of excessive meddling. Other commonwealths which have codified their entire jurisprudence are California, the Dakotas, Idaho, and Montana. The original New York Code of Civil Procedure has been adopted in its essentials in twenty-five states; the Code of Criminal Procedure in eighteen states. The Minnesota revision of 1903 illustrates some of the dangers inherent in this method of legislative action. The commission appointed to do the work was composed, not of representative legal experts, but rather

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of men selected on account of political influence. The actual work of revision was performed largely by the employees of a publishing house. The statutes were greatly reduced in bulk; but when the report of the commission was made, it was soon noticed that many of the omissions were exceedingly significant. This was especially true of the corporation law, which by apparently unimportant changes was really made much laxer and more favorable to the large corporate interests. The legislature was thoroughly aroused and over two thousand amendments to the revision were passed. As this work had to be done rapidly, the total result did not command the confidence of the most experienced and intelligent members. But although grave doubts existed as to the advisability of its adoption, the revision was put through as a party measure, because a large amount of money had been spent on it.<sup>1</sup>

The experience of all our commonwealths affords illustrations of the dangers of excessive meddling with the common law by legislative bodies. Questions of technical jurisprudence are not in themselves interesting to a legislature, and a proper discussion of measures of this nature can therefore not be expected. A revision to be successful must be carried out by trained and liberal-minded members of the legal profession, and must be adopted by the legislature largely on faith. Legislative meddling ordinarily proceeds from interested private persons who seek some special ad-

<sup>1</sup> In Iowa, in 1897, the report of an expert code commission was refused concurrence, and a code of inferior quality to that proposed by the commission was adopted by the legislature.

vantage and care nothing for the general character of the law. Every honest effort at reform necessitates expert knowledge of the law in all its intricacy, because otherwise the enactment will either be futile, or harmful through disturbing settled relations of law and creating uncertainty. When, after great expense to the state and to private individuals in litigation, the meaning of a certain provision of the code has been finally determined, it is very undesirable that a new amendment should sweep away all this jurisprudence and make it necessary to begin the work of interpretation over again.

It is interesting to note the attitude of the legal profession toward legislative law reform. Of course, the leaders of true legal reform will nearly always come from that profession, because its technical knowledge is necessary to secure effective amendment and revision of the law. So the great names in the annals of American law reform, like Livingston, Spencer, and Field, are those of highly trained and experienced lawyers. But the bulk of the profession is as a rule opposed to codification or radical revision. With the more broad-minded men the cause of this attitude is the belief which J. C. Carter has expressed, "that judicial procedure is not a fit subject of legislative interference, and that the development of the common law in general can be more safely intrusted to the judiciary than to the legislature." But the rank and file of the legal profession at times manifests a narrowly conservative spirit, opposed to simplifying changes which might serve to render the work of the lawyer less necessary. It will be remembered

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that it was legal practitioners who, through the unreasonable amendments imposed upon the New York Code for private advantage, caused it to grow into the enormity which we have before us. The original purpose of the code was to render procedure so simple that a man of ordinary intelligence might try his own case; but at present it would be too much to expect even the most expert pleader in New York to know the law of procedure in all its details. It has been acutely remarked that lawyers in dealing with commercial matters see mainly the pathology of business; its healthy physiological action is a matter outside of their professional experience. There is a grain of truth in this statement, which to some extent explains the limitations of lawyers as legislators.<sup>1</sup>

The defective character of the legislative product in the United States, has led to a serious consideration of methods of relief from this condition. As early as 1882, the American Bar Association passed a resolution recommending "the adoption by the several states of a permanent system by which the important

<sup>1</sup> When the negotiable instruments law favored by the commissioners of uniform statute laws came before the Michigan legislature, it was defeated in the Senate; the object being urged against it "that the law is an intrusion on the practice of the profession and that after codification the average man will not need a lawyer to collect his note." G. W. Bates, in the Michigan State Bar Association Report, 1903, p. 93. The author of this paper soothes the apprehensions of his brethren by expressing his conviction that codification does not mean the abolition of litigation, which will never happen till the millennium appears.

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duty of revising and maturing the acts introduced into the legislatures shall be intrusted to competent officers, either by the creation of special commissions or committees of revision, or by devolving the duty upon the attorney-general of the state." In 1886, there was submitted to the Bar Association a draft bill by which it was provided that the legislature was to appoint a joint committee on the revision of bills, to which all bills after passing both houses should be referred for examination as to clearness of expression and harmony with existing statutes. This method has actually been employed in the legislature of New York and in many other states. But it has not solved the difficulty. It is almost impossible to find members of the legislature who will devote their time to this work during the very part of the session when their attention is most actively engaged by matters before the houses. The Ohio legislature for many years possessed in each branch a committee of revision, but until recently, this committee was never effectively organized, in spite of the fact that the provision of the rules relating to its duties was mandatory. In 1902, however, with a strong man as chairman, the House committee held a meeting and "decided to organize and at least attempt to perform the duties prescribed by the rules. Announcement of this fact created, among certain members of the House, considerable consternation and indignation."<sup>1</sup> However, during the session there were referred to the committee and examined by it, more than four-fifths of the total bills introduced in the House. Many difficulties were

<sup>1</sup> Ohio State Bar Association Report, XXIV, 64.

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strewn in the path of the efforts of the committee. The Senate promptly abolished its committee of revision, upon hearing that the House committee was actually organized and prepared to act. The committee was not allowed to recommend indefinite postponement, although it could and did freely recommend reference of apparently invalid bills to the Judiciary Committee. The committee became powerless in the rush days of closing, when measures were introduced and passed under suspension of the rules, with a total absence of debate and amendment. "Many bills were reported out by the Revision Committee as invalid, but upon a member's arising in his seat and stating that the subject matter of the bill was such that it affected his constituency alone, and that he would assume the responsibility therefor, the House would frequently reject the report, and permit the bill to proceed to a third reading."<sup>1</sup>

More effective work in improving the legislative product can be done by an expert counsel to whom members may go for advice and the drafting of their bills and to whose scrutiny all measures are to be submitted before final enactment. The attorney-general, aside from being a political and partisan official, is too busy with the general duties of his office to give effective assistance in this respect. A thoroughly capable expert who with his assistants could give all his attention to this exacting and important work, would be able to improve the technical quality of legislation materially. A beginning has been made by the appointment of legislative counsel and drafts-

<sup>1</sup> *Idem*, p. 65.

## AMERICAN LEGISLATURES

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men in New York,<sup>1</sup> South Carolina, Connecticut, New Jersey, and Wisconsin, but a further development of this system is highly to be desired. In the British Parliament, no bill is introduced which has not passed through the hands of the official draftsman, a highly salaried and experienced official. He gives enactments the form in which they will usually accomplish the object desired and which will place their provisions in harmony with the rest of the law. The functions of this position require an expert knowledge of the statute and the common law as well as powers of incisive analysis and lucid, brief and conclusive statement. The British statutes drawn under this system are indeed models of workmanship, being free from the verbiage, redundancy, and obscurity which characterize so many American enactments. Justice Stephen has stated the requirements of a legislative draftsman in the following language:

“It is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.”<sup>2</sup>

<sup>1</sup> In New York, while the members of the Lower House make considerable use of the services of the draftsman, the senators mostly disdain to do so, and much unsatisfactory legislation originates in the Upper Chamber. New Jersey has a “supervisor of bills” who looks after the formal correctness of enactments.

<sup>2</sup> Lord Thring, for many years parliamentary draftsman, often dwelt on the manner in which his classical training had

## THE LEGISLATIVE PRODUCT

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In order to simplify the enacted law of the American commonwealths, and to give it a greater uniformity, many states have created commissions on uniform statute laws. These commissions have effected a national organization, holding annual conferences. The movement has already produced a positive result in the adoption by twenty-four states of the negotiable instruments act, recommended by the commissioners and drafted under their supervision. The conference has further induced prominent legal experts to draw a uniform sales act, a partnership act, and a warehousemen's act. It should be noted that the work of the commissioners thus far has been confined to commercial law. This branch of our jurisprudence ought indeed as nearly as possible to approach uniformity in all the states, not only because its origin is the law merchant, a product of the whole commercial world, but because commerce itself is principally an interstate and international affair. How far this movement can be made useful in other branches of the law is more doubtful. The statute law of the newer states has heretofore suffered a good deal from the indiscriminate copying of statutes of older commonwealths. But the fact that a law has worked well in New York is no reason, *per se*, why it should be adopted in New Mexico. The natural, social, and economic conditions of our nation are so diversified that a system of complete uniformity would by no means seem advisable. It may indeed be considered in many respects a great advantage that developed in him that power of exact expression which he needed in his work.

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Congress does not have any power over the general or common law of the nation. For with all the confusion and crudeness of the statute law, the opportunity is at least left to each commonwealth to work out the system most appropriate to its natural conditions.

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